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NOMINATION OF WILLIAM BRADFORD REYNOLDS TO BE ASSOCIATE ATTORNEY GENERAL OF THE UNITED STATES

HEARINGS

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

NINETY-NINTH CONGRESS

FIRST SESSION

ON

THE CONFIRMATION OF WILLIAM BRADFORD REYNOLDS TO BE ASSOCIATE ATTORNEY GENERAL OF THE UNITED STATES

JUNE 4, 5, AND 18, 1985

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NOMINATION OF WILLIAM BRADFORD REYNOLDS TO BE ASSOCIATE ATTORNEY GENERAL OF THE UNITED STATES

TUESDAY, JUNE 4, 1985

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee convened, pursuant to notice, at 10:30 a.m., in room SD-228, Dirksen Senate Office Building, Hon. Strom Thurmond (chairman of the committee) presiding.

Also Present: Senators Biden, Mathias, Kennedy, Grassley, Specter, Hatch, Simon, Metzenbaum, Heflin, Simpson, Denton, DeConcini, and Leahy.

Staff present: Duke Short, chief investigator; Frank S. Klonoski and Joseph Kopka, investigators; and Ruth E. Lucas, investigative clerk.

OPENING STATEMENT OF CHAIRMAN STROM THURMOND

The CHAIRMAN. The committee will come to order.

I regret starting a few minutes late, but I just got back from the White House. I hope it did not inconvenience anyone.

This morning, we begin confirmation hearings on President Reagan's nomination of William Bradford Reynolds to be Associate Attorney General of the United States.

I first want to welcome Mr. Reynolds, his charming wife Lynn, his parents, Mr. and Mrs. William Glasgow Reynolds, and his three daughters, Melissa, Kristina, and Wendy, to today's hearing.

Mr. Reynolds, you are to be congratulated on your nomination for this most important position. You can be proud of the trust and confidence placed in you by the President.

Mr. Reynolds' extensive training has prepared him well for this position. A 1964 graduate of Yale University, Mr. Reynolds also holds a degree from the Vanderbilt University School of Law. He has written a number of impressive legal articles and is widely regarded as one of this Nation's most able attorneys.

Mr. Reynolds has nearly 20 years of experience as an attorney. He began his legal career in 1967 as an associate with the New York firm of Sullivan & Cromwell, where he practiced until 1970. From 1970 to 1973, he served with the Department of Justice as Assistant to the Solicitor General. In 1973, he returned to the private sector, where he served as a litigation partner with the Washington law firm of Shaw, Pittman, Potts & Trowbridge.

Since 1981, he has served with distinction as an Assistant Attorney General for the Department of Justice Civil Rights Division.

Mr. Reynolds possesses the knowledge, good judgment and experience to serve in an exemplary manner as Associate Attorney General. As Assistant Attorney General for the Civil Rights Division, he has demonstrated his skills as mediator and problem solver and has a reputation as an individual of the highest integrity.

I firmly believe Mr. Reynolds is committed to equal justice for all Americans, and I am sure he will meet the challenges ahead with courage, enthusiasm and professionalism.

I am very pleased that President Reagan has nominated an individual of such high caliber for this important position, and I urge the members of this committee to act upon this nomination as expeditiously as possible.

Before calling on Senators Mathias and Roth for their presentations of President Reagan's nominee, each member of the committee will be recognized for brief opening remarks.

The Chair now recognizes the able Senator from Delaware, Mr. Biden, if he is here. I do not believe he is here yet.

Senator MATHIAS. Mr Chairman, I am engaged in a markup in the Foreign Relations Committee on the South Africa legislation, and I wonder if you would let me know when the time comes.

The CHAIRMAN. I would be pleased to recognize you now for a statement, Senator. Senator Biden is the ranking member and I was going to call on you next as ranking on this side.

Senator MATHIAS. Thank you very much, Mr. Chairman.

The CHAIRMAN. So you may proceed, Senator.

Senator MATHIAS. If Senator Kennedy has no objection.

Senator KENNEDY. Absolutely not.

OPENING STATEMENT OF SENATOR CHARLES McC. MATHIAS, JR.

Senator MATHIAS. Mr. Chairman, I have always thought that it is a unique responsibility of the U.S. Senate to consider Executive nominations. And one aspect of that consideration is the introduction of the President's nominees to the appropriate committees.

I have always thought it was a privilege to introduce to this committee the citizens of Maryland who have been nominated by the President.

In the case of Mr. Reynolds, an introduction is unnecessary, since he is already very well-known to the committee, having been before the committee for a previous confirmation.

Since that previous confirmation, I have followed his activities with care and interest—as he knows, perhaps too well, not always with complete agreement. But in spite of our disagreements, and perhaps because of them, he is much better known as he appears before the committee today than he was when he appeared before the committee nearly 4 years ago.

He is a competent lawyer with a distinguished legal career, as the chairman has just outlined. He is conscientious and committed. He is a distinguished citizen of Maryland. And it is my privilege, Mr. Chairman, to present him to the committee.

The CHAIRMAN. Thank you very much.

Senator Roth, we will be very pleased to hear from you at this time.

STATEMENT OF SENATOR WILLIAM V. ROTH, JR., A U.S. SENATOR FROM THE STATE OF DELAWARE

Senator ROTH. Well, thank you very much, Mr. Chairman.

It is a pleasure to introduce to the committee William Bradford Reynolds who, of course, comes before you as the President's nominee for the position of Associate Attorney General of the Department of Justice.

As Senator Mathias has pointed out, Mr. Reynolds is no stranger to the members of this committee, since he has appeared before you on several occasions in the past 4 years as Assistant Attorney General for Civil Rights.

And whatever philosophical differences or areas of policy disagreements some may have with positions he has taken on behalf of the administration, I am confident that all of my colleagues agree that his conduct as a public official has been in keeping with the highest standards of integrity, professionalism, and intellectual honesty. He is a man of high principles, impeccable moral character, who has the courage to stand on conviction.

Now, Mr. Chairman, I am happy to advise you that I am able to speak on Mr. Reynolds' behalf from a broader frame of reference, because he was raised in Delaware. I have known Brad and his family for many years, and as a neighbor and close family friend, I have followed his career with great interest.

After Yale, he went to law school at Vanderbilt, where he was editor-in-chief of the Law Review, graduated second in his class. He then went to New York City, where he was a member for 3 years of the illustrious firm of Sullivan & Cromwell. Brad then moved to Washington, DC, where he joined the Office of Solicitor General, serving there for 3½ years. He participated in the preparation of numerous Supreme Court briefs and argued 11 cases before the high Court. He has made three more Supreme arguments during the past 4 years.

In 1973, Brad entered private practice, joining the highly respected firm of Shaw, Pittman, Potts & Trowbridge, where he was involved in a wide variety of commercial litigation, building in the legal profession a reputation as one of the finest legal minds and ablest advocates in the area. As was already pointed out, in 1981 he was nominated by the President and confirmed by the Senate to be Assistant Attorney General for Civil Rights, inheriting what is generally regarded as one of the most difficult and controversial positions in Government. In this capacity, he served the country in the Justice Department with great competence and distinction.

Brad has now been selected by the President to assume higher office. He has earned the trust and confidence of the President and the American people.

I am happy to introduce Brad Reynolds to you with the recommendation, Mr. Chairman, that he be approved promptly by the committee, and sent to the full committee for quick confirmation.

Thank you very much.

The CHAIRMAN. Thank you very much, Senator.

We are very pleased to have you with us. You are welcome, of course, to stay longer, if you will, or if you are busy—and I am sure you are—you may wish to depart for other business.

We will now be pleased to hear from the ranking member, Senator Biden, if he has an opening statement.

Senator **Biden**. Thank you, Mr. Chairman.

I would like to invite Senator Roth to stay. We seldom get to see one another, other than on the train——

Senator **Roth**. I am going to your other committee.

Senator **Biden**. I am only kidding.

The **Chairman**. I would like to state that as President pro tempore, I have got to go and open the Senate, and I will be over there a little while. I am wondering if the able Senator from Utah will take the chair at this time.

Senator **Hatch**. Certainly.

OPENING STATEMENT OF SENATOR JOSEPH R. BIDEN, JR.

Senator **Biden**. Mr. Chairman, we have a number of witnesses. You were very accommodating in putting the hearing back so people could be prepared for this hearing, and consequently, I will not burden us with a long opening statement other than to welcome you, Mr. Reynolds. I suspect saying "welcome" to such a position as you are now in is not a very "welcoming" feeling to you. But there are a number of areas that I would like to pursue.

For the record, you and I have met, and I indicated to you some of my areas of concern. I am anxious to hear your explanations and rationale for some of the decisions made, and equally as important, as to where you see the Justice Department and your job as the number three person in that Department, moving this country, and how you view your role.

So I will withhold any further opening statement at this time, Mr. Chairman, and indicate we should probably get on with other people.

OPENING STATEMENT OF SENATOR ORRIN G. HATCH

Senator **Hatch** [presiding]. Thank you, Senator Biden.

I would just like to make a few comments and welcome you to the committee, Mr. Reynolds. Every member of the committee has had many opportunities to work with you. We appreciate the job you have tried to do and the sincerity with which you have done it.

During the past 4 years, you have served in one of the most difficult and, of course, most visible positions in any administration, Assistant Attorney General for Civil Rights. You have served in this position, in my opinion, with honor, with integrity, and with distinction.

Now, it is enough in my judgment to observe of your particular stewardship that the United States today is closer than ever to the attainment of the ideal of equal protection under the law for all persons.

The unfinished business that remains ought not to obscure this genuine accomplishment.

Now, it is, of course, no secret that your tenure in office has coincided with a growing national debate over the direction of civil rights policy. I do not think it is any secret that this debate has been joined on many occasions by members of this particular committee. And I do not know whether these hearings will become a further forum for continuing these important debates. Whatever the case may be, I hope that none of us lose sight of the fact that the debate is among sincere individuals, among honest persons, all of whom share a commitment to the achievement of equal opportunity for all. There are legitimate differences in this particular debate.

But disagreement on the means of pursuing this end ought not to be equated with misfeasance or moral turpitude, and I call the attention of all committee members to that particular statement.

So I wish to welcome you to the committee. I look forward to your prompt consideration and confirmation before the Senate. Furthermore, I would like to associate myself with the remarks of the distinguished Senator from Maryland, Mr. Mathias, in recommending you to the committee, and also the distinguished Senator from Delaware, whom I think stated the issue and your qualifications very, very well.

We will now turn to Senator Kennedy.

OPENING STATEMENT OF SENATOR EDWARD M. KENNEDY

Senator Kennedy. Thank you, Mr. Chairman.

Mr. Chairman, it is no secret that many of us have serious reservations about this nomination. The record of the Reagan administration on civil rights for minorities and women and the elderly and the disabled is unsatisfactory. And Mr. Reynolds has been the architect of most, if not all, of the administration's retreat on civil rights. Under his leadership, the Civil Rights Division has exploited numerous opportunities to roll back the past three decades of progress on civil rights.

The administration prides itself on cutting spending, yet it proposed the most unconscionable Federal subsidy of all—tax credits for segregated schools. And by all accounts, Mr. Reynolds was deeply involved in the administration's strategy to use the *Bob Jones University* case to reverse the longstanding policy of the Internal Revenue Service against subsidizing racial discrimination.

In 1982, after months of controversy that never should have happened, Mr. Reynolds 'legal argument was unceremoniously rejected by the United States Supreme Court by an overwhelming vote of 8-to-1.

The Civil Rights Division under Mr. Reynolds has impeded legitimate, indeed essential, efforts by black parents to intervene in school desegregation lawsuits. It has opposed voluntary local efforts to end school segregation, despite clear Congressional and judicial support for voluntary action.

In one desegregation case, it is reported that Mr. Reynolds instructed his staff to obstruct participation by black parents by making the parents jump through all the hoops. That is what lawyers in private litigation often do, but not lawyers representing the Department of Justice of the United States of America, at least not while this committee sits.

The Civil Rights of Institutionalized Persons Act passed in 1980 empowers the Attorney General to take State institutions to court in order to protect the Constitutional rights of the mentally retarded. In 4 years of nullification by Mr. Reynolds, the Justice Department has initiated only 10 investigations of mental retardation facilities, and in none of them has the Department actually filed suit.

In voting rights, Mr. Reynolds has overruled the Department's career attorneys and given his approval to redistricting plans and other election law changes that courts have later found to be not only discriminatory but blatantly discriminatory.

On the issue of discrimination by recipients of Federal aid, Mr. Reynolds led the administration's opposition to legislation to reverse the Supreme Court's decision on the Grove City College case.

This year, Mr. Reynolds has opened a new front in his assault on civil rights by launching a nationwide campaign to reopen existing consent decrees in more than 50 settled cases on job discrimination in order to conform them to his view of the Supreme Court's decision in *Firefighters Local Union Number 1784* v. *Stotts*. Many of the jurisdictions involved are proud of their affirmative action agreements and want to keep them. Mr. Reynolds 'interpretation of the *Stotts* decision has been rejected by every U.S. Court of Appeals that has ruled on the issue, four so far.

Ever since I came to the Senate in 1962, I have been proud to be part of a bipartisan majority in Congress committed to progress in civil rights. Republican and Democratic administrations have fought side-by-side with Congress for this cause. In spite of our best efforts, the evidence of widespread continuing discrimination in America is undeniable. The progress we have made towards justice and opportunity for all of our citizens is highly fragile. In my view, Mr. Reynolds has done enough damage to civil rights at his current level in the Department of Justice and does not deserve to be promoted.

Senator HATCH. Senator Grassley, we will turn to you.

OPENING STATEMENT OF SENATOR CHARLES E. GRASSLEY

Senator GRASSLEY. Thank you, Mr. Chairman.

I appreciate very much what my colleagues on this side of the aisle have said about your qualificaitons, and I endorse those, and I thank you very much for coming to my office for a long period of time to discuss some of the things that we have already discussed, and later on in the questioning, because I have no further opening statement, I would suggest that I will follow some questions along the line that I discussed with you in my office, dealing with the Defense Procurement Fraud Unit and also with the ability of our branch of Government to get information from the Department.

Thank you very much, Mr. Chairman.

Senator HATCH. Thank you, Senator Grassley.

Senator Metzenbaum?

OPENING STATEMENT OF SENATOR HOWARD M. METZENBAUM

Senator METZENBAUM. Mr. Chairman, as we approach the issue of the confirmation of Mr. Reynolds, we are faced with a rather difficult and challenging issue. I think it is fair to say that there are few positions in ou Government that are more crucial to fair and just application of the law than that of the chief legal officer of the Civil Rights Division.

We all know that during the 1950's and 1960's—when we had racial turmoil in this country—a symbol of the Federal Government's commitment in stopping discrimination was the U.S. Department of Justice. During the seventies, under both Democratic and Republican administrations, the Justice Department was looked to—it was like a beacon. It was that one place to which everyone turned, because it was the leading agency in aggressively protecting minority groups from discrimination and pushing our society, with all its terrible history of racism and sexism, toward a standard of fairness and equal justice.

The sad truth is that the last 4 years have witnessed a dramatic reversal in the commitment toward vigorous enforcement by civil rights laws, a commitment made by prior administrations, both Democratic and Republican. And I am frank to say that I have difficulty in understanding why. I cannot believe that there is some major force, whether it be the President or Mr. Reynolds or someone else, who does not believe that there ought to be equality under the law for all peoples, regardless of their race or their sex. And yet, this administration sometimes seems to be totally confused as to why the minorities of this country feel abandoned by it.

I do not know if our nominee was close to these issues during that period when we had the race riots, when Watts and Huff were burning down, like other areas in the country, including Washington. I was a part of the business community that time, and we came to Washington and wanted to know what could be done about it. Out of that came the Urban Coalition, and all were convinced that the conditions that then existed were intolerable. If the conditions then were intolerable, I do not know what the word is to describe the conditions today. So many more blacks are suffering today; so much more unemployment exists for young blacks in this country; so many more black women are finding difficulty in coping with society, and so many more black men are having difficulty finding a job.

And so they feel abandoned. And I do not believe it is the President—at least, I hope it is not. Sometimes, I feel that the President appears unaware of what his own Justice Department is doing. Maybe he is unaware. I do not know how close he has been to some of the actions or lack of actions taken by the Justice Department. I have no way of knowing. But if he would examine the record—and I hope that you, Mr. Reynolds, will address yourself to these concerns today—in fact, I think if any fair-minded American would examine the record, he or she could come to no other conclusion than that this administration has followed policies which are hostile to black Americans and other minorities, harmful to women, contrary to the interests of the handicapped, and in general, an assault on the most disadvantaged in our society. And I say—why? These are not evil people. You are not an evil human being. You are not a man who seems to be less than caring.

And I say—why would an individual provide that kind of leadership to turn back the clock in this great democracy of ours?

In the last 4 years, we have seen an attempt to persuade the Supreme Court to ignore longstanding executive branch policy and to grant tax-exempt status to institutions that engage in racial discrimination.

What holy writ prescribed that that should be the position of the Justice Department in going into that kind of an issue?

We find the undermining of the independence of the Civil Rights Commission through a deliberate attempt to install members who would support the administration's revision of civil rights policy. And I do not find that to be in your particular domain.

We find an assault on meaningful affirmative action remedies, including temporary hiring goals, even when the courts flatly reject the Department's legal theories and even when local officials tell the Justice Department to stay out.

I know that many of us on this committee are concerned as to what earthly reason there is for this Justice Department spending taxpayers' dollars and being so determined to go in and reopen cases where the local community says, "Please stay out. There is calm now. We are working it out with our minorities, and the racial issues are not high-profile. We have had enough of that. Please, do not come in and upset the apple cart. The waters are calm. Why make waves when there is no need to?"

And then someone in the Justice Department says, "Oh, yes. It is because we have to follow the law. We in the Justice Department must follow the law."

Well, to follow the law, you ought to be backing off, because every court that has looked at your position so far has come down to an opposite conclusion than the position that the Justice Department has taken. Yet the Justice Department seems hell-bent to keep pressing and reopening these cases.

And why does the Justice Department reverse the position of previous administrations in order to weaken the restrictions on the use of Federal funds to support discrimination?

Why is there a failure to enforce actively the law protecting institutionalized persons from violations of their civil rights?

If the Justice Department is so hell-bent to enforce the law because that is their concept of the law and must intervene in cases, then why isn't there that same determination and same resolve to move in, in order to protect the civil rights of institutionalized persons as provided by congressional enactment?

And why is there a consistent pattern of ignoring the law and the legislative mandate of the Justice Department by refusing to interpret the Voting Rights Act, the Fair Housing Act, and laws protecting handicapped persons and institutionalized persons as intended by Congress and intended by the courts?

If this is indeed an administration that believes that the law should be enforced, then that means all laws, not just those that somebody in the Department thinks should be enforced.

Frankly, Mr. Reynolds, to the best of my knowledge, there is no basis—at least, I have none at this point—for questioning your sensitivity to ethical standards and conflict of interest rules. Nor, as far as I know, is there a serious question as to whether you are qualified by your education and your experience to be Associate Attorney General. But that is not all there is to the totality of the position to which you aspire.

There are serious and troubling questions about your past practice of zealously pursuing your own interpretation of the law, rather than the law as enacted by the Congress and as interpreted by the courts. And to me, that is a basic issue. Does any one individual or group of individuals have a right to change the precedents that have been set, to come up with their own interpretations of the law, to refuse to enforce the law where they feel they should not, and to enforce it only in those cases in which they believe they should, even if courts have already said that they are wrong?

I certainly respect the right of anyone to propose that a law be changed and to be a zealous advocate for those changes in the law. No one would claim you or any other person does not have the right to do that, even though I might strenuously disagree with you. But I would not think that that would be a sufficient basis to be opposed to your confirmation.

It is quite another matter, however, for our senior legal officers who are entrusted to enforce the law to pursue their own policies and theories rather than the law as written.

I believe very strongly that the laws of our country should be enforced, that no one individual has the right to make his or her own determination as to which should be enforced and which should not be. This is an administration that has proven itself on its law enforcement policies. And to me, law enforcement policies mean enforcing the laws as they have been written by the Congress and interpreted by the courts, and not attempting to make new laws. And in connection, Mr. Reynolds, I must confess that I have very grave reservations as to whether or not this Congress, this Senate, should see fit to approve your confirmation.

Senator HATCH. Thank you, Senator Metzenbaum.

We will turn to Senator Specter.

OPENING STATEMENT OF SENATOR ARLEN SPECTER

Senator SPECTER. Thank you, Mr. Chairman.

I believe that this hearing is a very important one, because Mr. Reynolds is being considered for Associate Attorney General of the United States, the No. 3 position in the Justice Department, and that brings up the very wide discretion that Mr. Reynolds will enjoy in the enforcement of the laws of the United States.

Few people realize how broad the prosecutor's discretion is; it is described by the courts as boundless, almost limitless. And this is a very good occasion, in accordance with our system of checks and balances, to have a dialog between the legislative branch and Mr. Reynolds as he approaches the confirmation process for this important position.

I, too, have had the opportunity to talk with Mr. Reynolds as he has made himself available to confer with members of this committee in advance, and I believe that these conversations are very useful, as is this hearing process. There has been a great focus of attention on the *Memphis Firefighters* case, and I, too, have questions as to the legal basis for the position which Mr. Reynolds has asserted.

I believe strongly that a public prosecutor has to exercise his own judgment in pursuing the interpretation of the law which he sees, but that has to be tempered by the rulings of the courts, and I think this hearing process will enable us to get into the Supreme Court's decision and the opinions of three circuits which have disagreed with what Mr. Reynolds has articulated and two other circuits which have approached that position.

It would be my hope that during the course of these proceedings that as a result of this interaction, there may be a practical way of having judicial tests of already existing cases which have been decided in the lower Federal courts without going more deeply into upsetting decrees which are in effect in approximately 50 cities, States, and local governments which have already been touched, and if that could be obtained, I think that would be a very beneficial effect of the proceeding which we are having here today.

Beyond the kinds of cases which have already been mentioned, and they are very important, there are very important issues pending before the Justice Department on criminal law enforcement; a real question as to why guilty pleas are being taken from corporations with the payments of fines as opposed to prosecutions against individuals which might have a much more deterrent effect, and that is within the ambit of the prosecutor's discretion, but a subject matter which ought to be reviewed here today as we consider Mr. Reynolds' own views on that important subject, and also questions of antitrust interpretation on a wide range of issues, because the Associate Attorney General is really the operational officer who has great control, perhaps the most day-in and day-out control of the Department of Justice and the many U.S. attorneys who are called upon to execute the laws of the United States.

So I think this is a very useful proceeding, and I join the chairman in welcoming you here, Mr. Reynolds, for a very constructive analysis of your views on how we think the laws ought to be enforced.

Thank you, Mr. Chairman.

Senator HATCH. Thank you, Senator Specter.

Senator Simon.

OPENING STATEMENT OF SENATOR PAUL SIMON

Senator SIMON. Thank you, Mr. Chairman.

I think there is agreement, Mr. Reynolds, that you are a person of ability and integrity. Beyond that, there are serious concerns as you have heard, and as you know from our conversations.

Our civil rights laws are only theories unless you have the teeth to enforce them. Senator Metzenbaum used the word "zealous" in describing your activities. I guess the question that we face is, is there so much zeal on one side that you simply shatter precedents of the courts, shatter agreements that have been reached between communities and the Department of Justice? Do you make a sharp break with the past in order to move on your particular interpretation of what the law is?

The *Grove City* case disturbs me a great deal, and the action taken by you was criticized by a number of people within the administration—including, I might add, Clarence Pendleton, Chairman of the Civil Rights Commission. The House passed—over the objection of the administration—passed the Civil Rights Act of 1984 375 to 32, clearly a signal that somebody is getting the wrong message in the Justice Department.

The *Bob Jones* case has been referred to by both Senator Kennedy and Senator Metzenbaum.

Should the power of the Government to provide tax-exempt status be used to support segregation? It just seems to me that it is fairly apparent that the person who heads the Civil Rights Division of the Justice Department should not be supporting the tax-exempt status for discrimination, and the court ruled in that way 8 to 1.

We get down to real basics in the process of all of this. Is it the function, or should it be the primary function of government, to protect the rich and the powerful and the dominant, or should it be the function of government to stand up for people who need a message of hope?

And I think we, in the process of this deliberation here, have to weigh this question, because we are going to send a message—you happen to be the instrument of that message, Mr. Reynolds—but one way or another, we are going to let the people of this Nation know what we think about the enforcement of civil rights in this country as of right now.

I thank you, Mr. Chairman.

Senator HATCH. Thank you, Senator Simon.

Senator Denton.

OPENING STATEMENT OF SENATOR JEREMIAH DENTON

Senator DENTON. Thank you, Mr. Chairman.

I welcome Mr. Reynolds to today's confirmation hearing. I believe that he is well-qualified to be Associate Attorney General of the United States, and I commend President Reagan and Attorney General Meese for a fine choice.

Since the nomination seems to have elicited vocal criticisms which I consider inaccurate—criticisms from several editorial writers, advocacy groups, and I am sure, from some of my Democratic colleagues—I would like to say a few words about Mr. Reynolds.

I have carefully reviewed his career and record of accomplishment. They are a career and record marked by great distinction from the start. As a student, Mr. Reynolds was a dean's list graduate from Yale, and second in his class at Vanderbilt Law School where he was editor-in-chief of the Law Review and selected for the Order of the Coif.

He worked for 3 years with Sullivan & Cromwell, a highly respected New York City law firm. He then joined the Solicitor General's Office at the Department of Justice, the elite group of lawyers who argue the Government's case before the Supreme Court. He wrote approximately 40 Supreme Court briefs and presented 11 oral arguments to the High Court.

Mr. Reynolds left the Government to become a partner in the prestigious Washington, DC, law firm of Shaw, Pittman, Potts &

Trowbridge. By the time he rejoined the Government in 1981, he had rightly earned a reputation as a Washington superlawyer. No one, not even his severest critic, has ever questioned Mr. Reynolds' integrity, character, intelligence, or ability as a lawyer, and properly so.

His record as Assistant Attorney General for Civil Rights has been marked by a faithful effort to enforce civil rights laws as Congress intended those laws to be enforced, and by an unswerving commitment to equal justice under law for all of our citizens.

There are still some people, including members of this body and members of the media, who would subject Mr. Reynolds to a civil rights litmus test based on the degree of his support for racial goals and quotas. Although no one would question the legitimacy of using affirmative action goals to provide a remedy for actual victims of discrimination, one must be careful that racial goals do not engender reverse discrimination, as has sometimes been the case. That is, one must make sure that racial goals are a fulfillment of civil rights and not a denial of them.

As an Alabamian, I find myself in consonance and in empathy with the 31 black mayors in Alabama. I might add that that figure represents more minority mayors from that minority group than in any other State. I am working with the mayors to bring to bear the manpower, the human resources that we have been neglecting in the South for too long. The War Between the States, Reconstruction, the continued discrimination against blacks in the South, the needed nudge and even kick from the Federal Government during the fifties and sixties was certainly justified. Yet, discrimination has not entirely ended. There are still individuals who discriminate against blacks in a number of ways, and I am opposed to such discrimination and an actively involved in trying to bring economic opportunity and education where it is deserved and needed to end the discrimination. The South is rising again, and rising really for the first time to economic heights because these black people are being educated, are taking part in not only unskilled but skilled labor, and in managerial positions. That is why the Sun Belt is coming into its own.

So I am supportive of equality of opportunity, I am with civil rights for all citizens. I am with trying to permit equality of opportunity and for the victims of actual past discrimination a little extra boost, a boost up, a hand up, rather than a hand out.

As to Mr. Reynolds, I admire a person of high principles and courage. I commend him for his resolute adherence to the principle of true equality in the face of unfair and often personal attacks by the proponents of what would in effect be reverse discrimination. The recent groundless attacks on Mr. Reynolds for his defense of civil rights against the quota system say much about his critics and their sense of justice. The only thing those attacks say about Mr. Reynolds, however, is this, by his steadfast commitment to the principle of equality of opportunity, by his straightforward opposition to reverse discrimination, and by his refusal to wilt or trim his sails on those crucial issues and take the easier road so as to escape bitter partisan attacks, his refusal to do those things has demonstrated his suitability for the position to which he has been nominated. I am glad he is nominated. I am proud to support his nomination. I thank you, Mr. Chairman.

Senator HATCH. Thank you, Senator Denton.

We will turn to Senator Heflin at this time.

OPENING STATEMENT OF SENATOR HOWELL HEFLIN

Senator HEFLIN. Mr. Chairman, this of course is a very important hearing for the high position of Associate Attorney General.

I try to approach all confirmation hearings with an open mind. However, there have been a number of charges concerning your direction of the Civil Rights Division of the Department of Justice that raise legitimate concerns, and this hearing will go a long way toward either approving, disapproving, or leaving us in a state of doubt as to some of those charges.

I anticipate that this hearing will involve a number of things: one, your past performance; two, how you will perform in your new position; and thirdly, I would assume it will involve a review of this administration's policy and history in the field of civil rights.

I think this hearing is appropriate and these subject matters that I have listed are appropriate to be considered. But I will approach this matter with an open mind.

Thank you.

Senator HATCH. Thank you, Senator.

Senator DECONCINI.

OPENING STATEMENT OF SENATOR DENNIS DeCONCINI

Senator DECONCINI. Mr. Chairman and Mr. Reynolds, I look forward to your being here and listening to your testimony. I appreciate your willingness to appear and listen to all of us expound on how welcome you are here. And indeed, we hope that that is the way you feel when it is all said and done.

As you know, many civil rights groups in the United States have opposed your nomination. They will appear today and the following day, setting forth their beliefs as to why you should not be Associate Attorney General.

I want you to know that I have not decided yet how I would vote on your confirmation. I will examine closely the allegations made against you and your answers to those allegations will bear heavily on my final vote. I will then make my decision based on what I believe is in the Nation's best interest. I will start this process, as I do with all nominations: with the presumption in favor of the President's nominee. However, there are some questions presented by your nomination that I must have answered to my satisfaction.

The most important qualification that a candidate for this position must show is the ability to carry out his or her responsibility according to the law, as determined by Congress and the courts, regardless of political pressure or personal opinion.

In your case, we have a history to go by in determining your independence and faithfulness to the law. We will examine your record as Assistant Attorney General for Civil Rights for guidance. There are allegations that as the Assistant Attorney General, you made decisions in several cases involving the Voting Rights Act, based on political considerations. These are mere allegations as far as this Senator is concerned. There are also allegations that you allowed your personal opinion to color your judgment in cases involving the Civil Rights Act, the Civil Rights for Institutionalized Persons Act, section 504, the Education Amendments of 1972, the Competition in Contracting Act, and other civil rights laws. Again, as far as I am concerned, these are allegations, and this is the proper forum for them to be explained or substantiated.

I hope you will be able to satisfy the committee that these allegations are untrue. I also hope that you and the majority on the committee do not attempt to make the issue before us the advisability or legality of quotas or busing or some other issue. Those are not the issues, as far as I am concerned, that are being presented to us. The question we are faced with is your qualifications, particularly your commitment to enforcing the law.

Mr. Reynolds, I look forward to hearing you answer the questions and your opening statement.

Thank you, Mr. Chairman.

Senator HATCH. Thank you, Senator DeConcini.

Mr. Reynolds, if you will stand, please, and take the oath.

Do you swear that the testimony you will give in this hearing will be the truth, the whole truth, and nothing but the truth, so help you, God?

Mr. REYNOLDS. I do.

Senator HATCH. I would like you to introduce your family to us, if you would.

Mr. REYNOLDS. Thank you, Mr. Chairman.

With me today are my mother and father, Mr. and Mrs. William Glasgow Reynolds, and my three daughters, Wendy, Melissa, and Kristina, and my wife, Lynn Reynolds.

Senator HATCH. Well, we certainly welcome your wonderful family here. As I understand it, your son is in school.

Mr. REYNOLDS. My son is at college at Vanderbilt, so he could not be here today.

Senator HATCH. I see. Well, we are happy to welcome you all here. We hope this will be an interesting and worthwhile experience for you.

All I can say is that this committee provided a lot of interest on these nominations lately.

Mr. Reynolds, if you would like to, we will take any opening statement you would care to make at this time.

TESTIMONY OF WILLIAM BRADFORD REYNOLDS, OF MARYLAND, NOMINATED TO BE ASSOCIATE ATTORNEY GENERAL OF THE UNITED STATES

Mr. REYNOLDS. Thank you, Mr. Chairman.

I would like to thank Senator Mathias and Senator Roth for the kind and gracious remarks that they both made in introducing me to the committee, and to the chairman and Senator Biden and members of the committee, it is a real privilege for me to be able to appear here before you today.

I would like to say that I very much appreciate the many courtesies and kindnesses that all of the members of the committee have extended to me during the past several weeks and also would like to thank the members of the committee staff for their assistance and cooperation in preparing for this hearing.

I am particularly grateful for the opportunity that I have had to meet with most of the members of the committee in advance of today's hearing. The discussions that I had in those meetings were most beneficial and informative to me, and I hope they were similarly helpful to the members of the committee.

I also would like to take this opportunity to express my appreciation to Attorney General Meese for recommending me to this position and my gratitude to the President of the United States for his confidence in nominating me to the office of Associate Attorney General.

While the Associate Attorney General has many responsibilities, the overarching one shared by everyone in the Department of Justice is to see to it that our country's laws are faithfully executed so as to secure and promote justice for all.

I promise this committee that if confirmed, I will continue to dedicate myself to that principle.

I look forward to and welcome the opportunity to answer all of your questions fully and forthrightly, and I look forward if confirmed to working closely with all the members of this distinguished committee.

Thank you very much.

Senator HATCH. Thank you, Mr. Reynolds.

We have received for the committee a number of letters that we will put into the record at this time. Let me just read two of them, both from former Attorneys General of the United States.

The first one is from Griffin Bell.

"DEAR MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE ON THE JUDICIARY: Mr. William Bradford Reynolds has been under sharp attack recently because of the Department of Justice's policies on quotas and school busing. The Justice Department's policies on civil rights and other critical areas including antitrust are established by the President. This role was defined by our Constitutional system and its separation of powers and checks and balances, and should not be the focus of challenge in confirmation hearings on the Associate Attorney General.

"Generally, the Judiciary Committee in the confirmation process addresses the character and ability of the individual to hold the office. It is quite unusual for the policies of the President to become the issue when the Department of Justice is carrying out those directives. The law is not clear on the busing and quota issues, and the President is afforded room for his policy directives.

I encourage you to focus on Brad Reynolds "liabilities"—

Not "liabilities," but "abilities"—there is a distinction there [laughter].

Senator HATCH [reading]:

Abilities as a lawyer to perform the responsibilities of Associate Attorney General. He is a person of integrity and character and unquestioned ability.

I have known Brad for several years and prior to his joining the government. I recommend him without reservation.

GRIFFIN B. BELL.

The second letter is from former Attorney General and Secretary of State William R. Rogers.

DEAR MR. CHAIRMAN: The Committee on the Judiciary of the United States Senate is now considering the President's nomination of William Bradford Reynolds to be Associate Attorney General of the United States. I am writing to express to the Committee and the Senate my support for Mr. Reynolds.

Mr. Reynolds' general character, high ethical standards, scholarship and intelligence are of the highest order. His experience within the United States Department of Justice and prior thereto in the private practice of law provide a breadth of experience and background which will be invaluable in this new post to which he has been nominated.

Mr. Reynolds has served for four years as Assistant Attorney General with responsibility for the Civil Rights Division. The Civil Rights Division, its purpose and accomplishments have long been to me a matter of great interest and pride. It was during my tenure as Attorney General of the United States in 1957 that the Civil Rights Division was created. Its mission was perhaps best stated by the elder John Marshall Harlan : "Our Constitution is color-blind and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The law regards man as man and takes no account of his surroundings or his color when his civil rights as guaranteed by the supreme law of the land are involved.

The implementation of those general principles has, quite naturally, been the subject of many opposing points of view and has been fraught with continuing controversy. Mr. Reynolds has been a strong believer in and supporter of those principles and has faithfully served the President and the Attorney General in their implementation.

Consistent with the view of Justice Lewis Powell of the Supreme Court, he has championed the ideal of the color-blind society and has presented that view in the courts of this country with conviction and consistency. At all times, he has shown respect and deference to the judicial authority provided by the Constitution of the United States. I have every confidence in his ability to serve as Associate Attorney General of the United States with dedication and distinction and to faithfully execute the laws of the United States under the leadership of President Reagan and Attorney General Meese.

I respectfully urge the Judiciary Committee and the Senate of the United States to confirm his nomination.

We will also put letters into the record from Morris Abram on the Commission of Civil Rights; the Anti-Defamation League; the Association of American Physicians and Surgeons, and a group of Congresspeople who are opposing the nomination here today.

Senator METZENBAUM. Were all those letters favoring the confirmation?

Senator HATCH. No; the last letters were unfavoring.

Senator METZENBAUM. Oh—you did not read those?

Senator HATCH. No, I did not. But we will be happy to have you read them if you want to. As I understand it, three of these Congresspeople will be testifying, so I do not see any reason to read them.

[Aforementioned letters follow:]

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May 29, 1985

Senator Strom Thurmond
S-R-218
Russell Senate Office Building
Washington, D.C. 20510

Committee on the Judiciary
S.D.224
Dirksen Senate Office Building
Washington, D.C. 20510

Dear Mr. Chairman and Members of the
Committee on the Judiciary:

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I encourage you to focus on Brad Reynold's abilities as a lawyer to perform the responsibilities of Associate Attorney General. He is a person of integrity and character and unquestioned ability. I have known Brad for several years and prior to his joining the government. I recommend him without reservation.

Sincerely,

Griffin Bell

Griffin B. Bell

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85 MAY 31 AM 11:10

May 31, 1985

The Honorable
J. Strom Thurmond
Chairman, Committee on the Judiciary
United States Senate
Washington, D. C. 20510

Dear Mr. Chairman:

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Mr. Reynolds' general character, high ethical standards, scholarship and intelligence are of the highest order. His experience within the United States Department of Justice and, prior thereto, in the private practice of law provide a breadth of experience and background which will be invaluable in his new post for which he has been nominated.

Mr. Reynolds has served for four years as Assistant Attorney General with responsibility for the Civil Rights Division. The Civil Rights Division, its purpose and accomplishments have long been to me a matter of great interest and pride. It was during my tenure as Attorney General of the United States in 1957 that the Civil Rights Division was created. Its mission was perhaps best stated by the elder John Marshall Harlan: "Our Constitution is colorblind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law...the law regards man as man, and takes no account of his surroundings or his color when his civil rights as guaranteed by the supreme law of the land are involved."

The implementation of those general principles has, quite naturally, been the subject of many opposing points of view and has been frought with continuing controversy. Mr. Reynolds has been a strong believer in and supporter of those principles and has faithfully served the President and the Attorney General in their implementation.

Consistent with the view of Justice Lewis Powell of the Supreme Court, he has championed the ideal of a color blind society and has presented that view in the courts of this country with conviction and consistency. At all times he has shown respect and deference to the judicial authority provided by the Constitution of the United States.

I have every confidence in his ability to serve as Associate Attorney General of the United States with dedication and distinction and to faithfully execute the laws of the United States under the leadership of President Reagan and Attorney General Meese. I respectfully urge the Judiciary Committee and the Senate of the United States to confirm his nomination.

Sincerely,

William Rogers

William P. Rogers

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May 17, 1985

Senator Strom Thurmond
Chairman
Senate Committee on the Judiciary
United States Senate
218 SROB
Washington, D.C. 20510

Dear Senator Thurmond:

I would like to be present in person on June 4, to testify in favor of the President's nomination of William Bradford Reynolds. As I have informed your staff, I shall be in Orlando, Florida and, therefore, am employing this means of communicating my views.

Leaving everything else aside, there is a fundamental issue of crucial importance poised by this nomination -- an issue which runs to the grand design of the Founding Fathers and especially the Separation of Powers established in the Constitution. There has not been the slightest doubt since Myers v. United States, 272 U.S. 52, that the President is in charge of the Executive Branch for which he is held responsible and accountable. In the words of Mr. Chief Justice Taft, at page 117:

> The vesting of the executive power in the President was essentially a grant of the power to execute the laws. But the President alone and unaided could not execute the laws. He must execute them by the assistance of subordinates. This view has since been repeatedly affirmed by this Court. . . . As he is charged specifically to take care that they be faithfully executed, the reasonable implication, even in the

> absence of express words, was that as part
> of his executive power he should select those
> who were to act for him under his direction
> in the execution of the laws.

The Senate's power to "advise and consent" must, therefore, rest on the inspection of the President's nominations in terms of qualification and integrity. In the case of Reynolds, there can be no doubt of his qualifications and I do not know of anyone who points to any blemish on his character. Indeed, if there ever was a man who responds to the call of his conscience rather than political opportunism, it is Mr. Reynolds -- whether one agrees with his views or not.

The objections to Mr. Reynolds arise because he agrees with the policies of the President of the United States, and in whose Executive Branche he serves. One may well ask, therefore, how can Mr. Reynolds be opposed on the grounds that he would execute the policy which a freshly re-elected President would pursue, having given full notice of these policies by platform, by declaration, and by four years of previous administration. The question is whether the President is entitled to be supported in his own branch or whether he is to be frustrated by persons holding views contrary to his own and rejected at the polls.

Respectfully yours,

Morris B. Abram

Senator Hatch. Now, Senator Thurmond would like to alternate between sides this morning, allow each Senator 15 minutes for questions, and if additional questions remain after round one, the process will be repeated.

Mr. Chairman, I will return the gavel to you.

The Chairman. I wish to thank the able Senator from Utah for presiding in my absence while I went to open the Senate.

Now, we will have 15 minutes for each Senator, and that way, we will rotate among the various Senators.

I will now take 15 minutes, or as far as I can go in 15 minutes, so if someone is operating the lights, we are ready to start.

Mr. Reynolds, would you tell the committee what your general duties would be under Attorney General Meese and how you will coordinate these activities with the Deputy Attorney General?

Mr. Reynolds. Mr. Chairman, if I am confirmed as Associate Attorney General, the structure of the Department will be——

The Chairman. Please speak into the microphone and speak a little louder.

Mr. Reynolds. If I am confirmed as Associate Attorney General, the Attorney General plans to assign the principal coordination responsibilities for the noncriminal matters in the Department to the Associate Attorney General and the criminal matters in the Department will be those of the Deputy Attorney General.

The Chairman. Mr. Reynolds, since 1981, you have served as Assistant Attorney General for the Civil Rights Division. Would you tell the Committee what you feel have been the major accomplishments of the Civil Rights Division under your leadership?

Mr. Reynolds. Mr. Chairman, I believe that there have been a number of accomplishments. I guess I would point first to the enforcement record that we have compiled and all of the civil rights enforcement under my responsibility, which has outdistanced that of the prior Administration on all fronts and outdistanced that of any Administration in the areas of voting rights and criminal civil rights enforcement.

I think, also, that another area of significant accomplishment has been with regard to the activities we have taken to advance the rights of handicapped individuals in this country. Also, as part of my responsibilities, I was Chair of the Architectural Transportation Barriers Compliance Board, and that responsibility required that we look to accessibility standards throughout the government. There was a set of guidelines established by that agency that did indeed open up government facilities in full measure to accessibility requirements, and in addition prompted four of the Federal agencies to come up with uniform accessibility standards on behalf of the handicapped community.

I think, also, a significant accomplishment was our development—after 2 years of waiting—of a statute that Congress passed in 1978 as an amendment to the Rehabilitation Act that required regulations to be put in place by the Government dealing with accessibility for handicapped persons and the rights of handicapped persons in federally conducted programs. There were no regulations that were promulgated for 2 years. When we came into office, we turned our attention to that, and we have put out a comprehensive and effective set of regulations.

Also, in the area of handicapped rights, I would have to point to the significant *Conrail* decision in the Supreme Court where we opened up employment opportunities to those people with disabilities, and I would point in addition to the efforts that we have made thus far in connection with the Baby Doe situation where we have sought to apply handicapped discrimination statutes to the youngest among us as well as to the oldest.

Another accomplishment of considerable significance is the Voting Rights Act where, after the 1980 census, the Civil Rights Division almost singlehandedly went about the business of ensuring redistricting in all covered jurisdictions in a manner that, after much back and forth with the jurisdictions, resulted in a comprehensive redistricting that I think everybody has to agree was most advantageous to the minority populations throughout the South and was a significant factor in the amount of political influence that was felt in the past several years in elections: And I would also point, as another accomplishment, to the alternatives that we fashioned to mandatory student assignments or forced bussing, a remedy in the school desegregation area that had relied on almost exclusively. We came into office and thought there was a better way to achieve desegregation and also to attend to the educational needs of the children in those environments. We worked on a comprehensive magnet school kind of a remedial program. It is one that we developed after much effort and working throughout the Government. It is one that has been put in place in a number of jurisdictions. It is working and working exceedingly well, not only to desegregate the school systems, but also to provide much-needed quality education in areas where it had been waning in recent years.

The **Chairman**. Mr. Reynolds, there will be a great deal of discussion today about your record as Assistant Attorney General for the Civil Rights Division. However, as Associate Attorney General, you will also be responsible for overseeing all other civil law matters.

Would you tell the committee what experience you have as a lawyer in matters outside of civil rights issues?

Mr. **Reynolds**. Mr. Chairman, some others have spoken to my past professional career thus far. When I graduated from law school, I joined the law firm of Sullivan & Cromwell and was involved in extensive commercial litigation with that firm for 3½ years. I was then with the Solicitor General's Office for another 3½ years, dealing with matters before the Supreme Court of the United States on a range of issues that included all of those that are within the responsibility that I would be assuming if confirmed as the Associate Attorney General. I was then, for 8½ years, a partner in a law firm here in Washington as a litigator in the commercial litigation field, and I think that has well equipped me. Finally of course, my last 4 years I have been in the Department, I have seen how the Department works and have been close to many of the working relationships of the Department. I believe that this background does indeed equip me to assume this position.

The **Chairman**. Mr. Reynolds, some of the criticism aimed at your record concerns your refusal to resort to busing as a tool to desegregate schools. Would you explain your views on school desegregation, the reasons why you do not recommend busing as a remedy, and the alternative remedies you do recommend?

Mr. **Reynolds**. Mr. Chairman, when this administration assumed office at the beginning of the first term, we took a very close look at the remedy of mandatory bussing that had been used in the courts, and we found that in a number of jurisdictions, that remedy had been applied and it had not been effective—indeed, it had been countereffective in many respects—in terms of achieving the goal of desegregating the school systems.

We have no quarrel at all with the fact that the Supreme Court has said it is an available remedy, that it is one to be used albeit carefully and cautiously. Congress has indicated that if used, it is to be used as a last resort. We thought it was incumbent on us, in view of the history of the mandatory bussing remedy, to see if we could develop a different and alternative way to achieve desegregation and also attend to the educational needs of the children who are in those school environments.

As I indicated, we went about that task, and I am proud to say that we came up with a meaningful alternative. We feel that since that alternative promises to be more effective and promises to attend not only to the desegregation prong of *Brown* versus *Board of Education*, but also that aspect of *Brown* that said that the educational needs of the children in these public schools ought to be attended to, that we should have used that alternative rather than go to the device or the remedy which in use had proved to be so divisive and so counterproductive in so many jurisdictions.

The **Chairman**. Mr. Reynolds, section 2 of the Voting Rights Act authorizes a challenge to any electoral scheme which is not equally open to all citizens. Section 5 allows the Attorney General to approve any proposed changes in election procedures or practices in covered jurisdictions.

Would you tell the committee what your present responsibilities are under these sections and how you have carried them out?

Mr. **Reynolds**. Under section 5 of the Voting Rights Act, Mr. Chairman, it is my responsibility to review every voting change that is undertaken by one of the nine States covered by section 5 and by any county in those seven States—any covered county in those seven States that are partially covered. Those changes are submitted either to the Attorney General or to the U.S. district court here in the District of Columbia. I think it is fair to say that the Attorney General receives most of those submitted changes, and our responsibility is to review them under a standard that determines whether they are discriminatory as to purpose or whether they cause a retrogression or dilution of the minority's voting opportunities. With regard to that activity, since I have been in the Division, there have been over 50,000 voting changes submitted to the Attorney General. I am pleased to say that in carrying out our responsibility in that regard, I am aware of only two instances where a court has disagreed with a decision made by the Attorney General in those 50,000-plus voting changes that we have had to review.

Under section 2, which was amended in 1982, the Congress enacted a standard for all voting matters nationwide, not just the covered jurisdictions. That standard was one that required that as to voting matters, any practices or procedures that had discriminatory results would violate the new section 2. We undertook, as soon as that was enacted, to launch a strenuous enforcement effort of that provision. We set up a special litigation unit within the voting section of the Division to go after just those section 2 cases. That voting section has been involved in a number of cases since we did that—I believe the number is something like 26 section 2 cases; 9 others in which we have intervened where we were dealing with the constitutionality of section 2, and we argued that it should be upheld as constitutional—and I think we have compiled a remarkably fine record in regard to our enforcement of that provision since it was enacted in 1982.

The **Chairman**. Mr. Reynolds, under what circumstances do you feel it is necessary to send observers to monitor the conduct of an election, and when have you resorted to this procedure?

Mr. **Reynolds**. There is under the Voting Rights Act a specific provision dealing with the use of Federal observers in elections. There is an elaborate process that is used by the Government to implement that provision. We have indeed used that on numerous occasions in the past 4 years. Indeed, I believe it is accurate to say that we have utilized that position and sent Federal observers to view elections in more instances and used more observers than any previous time under the Voting Rights Act, certainly in recent memory. We generally check with the local authorities as well as minority groups and minority interests in the jurisdictions, and if asked to come in, in most cases we will accommodate that request and have Federal observers at the voting place.

The **Chairman**. Mr. Reynolds, we have heard a great deal of discussion about your interpretation of the *Firefighters Local Union*

1784 v. *Stotts* decision, commonly referred to as the *Memphis Firefighters* case. Some say it has no application to an employer's hiring and promotion decisions and is limited to seniority or layoff issues.

What is your interpretation of this decision, and would you cite the specific passages in the Court's decision upon which you relied?

Mr. REYNOLDS. Mr. Chairman, the *Memphis Firefighters* decision is one that I think does deal directly with the interpretation of title VII which is the employment discrimination statute in the Civil Rights Act of 1964. The provision that was interpreted by the Court is one that is known as section 706(g) and deals with what authority a court has to remedy an employment discrimination situation.

What the Court held in that regard, I believe, is that the Court's remedial authority under title VII is limited to ensuring make-whole relief for victims of discrimination and prospectively enjoining any future discrimination that might occur, and at the same time, resorting to affirmative action techniques in the traditional sense of outreach and recruitment programs that are designed to bring increasing numbers of minorities and women and others into the work force who have been denied that opportunity largely because they have been denied any notice of possible employment vacancies.

The specific passages in the Supreme Court decision are at the very end of the decision, that is, the last 2½ pages of discussion by Justice White in his opinion where be talks about the policy of section 706(g), and says that that policy is one that Congress intended the courts should indeed order make-whole relief for all victims of discrimination, but that the authority was indeed not to go beyond that and did not include or embrace the idea of quota relief for nonvictims of discrimination. Indeed, the Court in that passage quoted indeed from the legislative history, in a number of particulars, and used specifically the quote of Senator Humphrey when he said—and I can read to you his quote—"Contrary to the allegations of some opponents of this title"—that is, title VII—"there is nothing in it that will give any power to the Commission or to any court to require hiring, firing or promotion of employees in order to meet a racial quota or to achieve a certain racial balance. That bugaboo," said Senator Humphrey, "has been brought up a dozen times, but it is nonexistent."

The Court relied on that and other passages in the legislative history to conclude that the remedial provision of title VII was not one that would allow the courts to use quotas or other techniques designed to achieve a certain racial balance.

The CHAIRMAN. My time is up. In fact, it was up a couple of minutes ago. But any time a question has been asked, we will allow you to finish the answer to that question even though the time is up.

Senator Laxalt requested that a statement endorsing you be placed in the record, and without objection, that will now be done.

If any other Senators have any statements to go into the record for or against, they will be placed, if there is no objection.

[Documents follow:]

PREPARED STATEMENT OF SENATOR PAUL LAXALT

Mr. Chairman, as I think we all recognize, we have before us an unusually able public servant. The promise that Brad Reynolds demonstrated in his undergraduate days at Yale and while Editor-in-Chief of the Vanderbilt Law Review has certainly been fulfilled over his distinguished legal career. Both in the private practice of law with two prominent firms and in government service, Mr. Reynolds has proven himself a first-class lawyer. His qualifications to serve the Attorney General who has selected him for this position of trust are indisputable.

Scanning the papers and reading the scattered mail that I have received on this nomination, I have the sense that for some, the question is not 'can Brad Reynolds do the job,' but rather, 'won't he do it too well?' Mr. Reynolds is indeed committed to helping carry out the policies of the Administration consistent with the law of the land. Given our democratic system of government, that does not seem to me a terribly dismaying prospect—although I realize that some may find it so.

I somehow expect that over the course of this hearing, we will delve into Mr. Reynolds' record as Assistant Attorney General for the Civil Rights Division. Having served vigorously in that post over a long period of time, and having endeavored faithfully to enforce a tremendously complex body of law, he has inevitably come under attack from all sides.

He has brought a record number of suits in many areas; overall, he has initiated more criminal civil rights prosecutions than did his predecessors, just as he has launched more employment discrimination suits than did those who served before him. I know that one police department in my own state believes Mr. Reynolds to have gone far beyond what the law allows in trying to make out a case of discrimination and in seeking to impose an affirmative recruitment program. The courts, of course, will ultimately have to decide the matter.

Mr. Reynolds has also come under fire for taking a position against quotas, a view mandated by his belief that our laws prohibit race and sex-conscious preferential treatment. Whether one agrees or disagrees with this stand, whether one refers to preferential treatment as "quotas" or as "reverse discrimination," it seems hard to maintain that Mr. Reynolds has no support for his arguments. As the Supreme Court declared in the *Scotts* case (where Mr. Reynolds successfully argued on behalf of a union supported seniority system), the policy behind Title VII, "which is to provide make-whole relief only to those who have been actual victims of illegal discrimination, was repeatedly expressed by the sponsors of the [Civil Rights] Act during the congressional debates." As Justice O'Connor further noted in her concurrence, even a policy favoring voluntary settlement "does not, of course, countenance unlawful discrimination against existing employees or applicants." The Justice went on to observe that the laws protect all Americans, regardless of race or sex, against illegal discrimination.

Mr. Chairman, no one can serve in Brad Reynolds' current position and win sustained applause from all observers on every issue. If he did, he probably would not be doing his job. Surely Mr. Reynolds has been controversial, just as the debate over quotas and forced bussing has been controversial. He has also proven himself, however, an able and intelligent administrator, and I see no reason at this point for the Attorney General not to be granted his choice for the number three post in the Department.

PREPARED STATEMENT OF SENATOR ALAN K. SIMPSON

I am very pleased to join in welcoming to this committee today, Brad Reynolds, nominee for associate attorney general for the Department of Justice. He has been chosen by President Reagan to assist the Attorney General and the Deputy Attorney General in formulating and implementing programs for the Department of Justice, programs which reflect this administration's positions and policies.

The function of the Judiciary Committee in this confirmation hearing is to determine whether or not Mr. Reynolds is qualified to serve in this position, whether he has the extensive legal experience and management ability necessary to carry out his duties in performing the responsibilities of the associate attorney general.

Brad Reynolds has already distinguished himself highly in the private sector, as well as in his public service, with a fine history of intelligence, integrity and performance. His prior experience as assistant to the Solicitor General and as head of the Justice Department's Civil Rights Division gives him the necessary expertise to perform this job with distinction. I feel quite certain that there will be a great deal of heavy artillery leveled at you during this hearing—and the artillery shells will be labeled "emotion and racism". I think there have been some serious distortions of positions of this administration made in the area of civil rights in my time here. And yet if one looks dispassionately upon this administration's record with regard to care and attention to minorities in this country and throughout the world, it is a defensible record that can not be scoffed at or diminished by those who simply just don't like the President of this United States or anything he tries to do. This Congress—Democrats and Republicans alike—is not going to allow the trashing of civil rights policies that have been placed on the books by Democratic and Republican legislators and by Democratic and Republican Presidents throughout the past 30 years. There are some skilled slashers out there ready to carve you up, but I feel that you will handle yourself with quiet distinction in this grilling process that is so necessary to assuring that we have people well qualified to attend to the burdens of the task placed before them. The burdens of this job will be heavy for you, Brad, and I think you have demonstrated previously an uncommon legal skill and a very real and sincere commitment to carry out the duties which are entrusted to you in helping to carry out this Nation's policies in a very sensitive area of the law.

I wish you well in these proceedings, and I also greet your lovely wife, Lynne, and your three delightful daughters. I am also pleased that your parents are here to observe this fascinating nomination hearing process.

Thank you.

Prepared Statement of Senator Mitch McConnell

Mr. Chairman, I appreciate the opportunity to be here today for this important hearing. I apologize that I am not able to stay for the entire round of opening statements and for the complete testimony of Mr. Reynolds, but I am scheduled to testify before the Senate Foreign Relations Committee this morning on the anti-apartheid bill Senator Roth and I introduced earlier this session.

Let me just say, however, that I admire Mr. Reynolds' courage and conviction, and that I especially admire the responsible and professional manner in which he has handled both his work at the Department of Justice as well as the pressure that has been brought to bear on him in connection with this confirmation hearing. It is clear to me that the position of Assistant Attorney General for Civil Rights is one of the most difficult and demanding jobs in the government. The challenge of balancing the interests of all the factions and interests, from the cities and states, to the public interest groups and the activists on both sides of an issue, is significant. It is all the more significant, and demanding, when the interests of none of those factions, who may be quite vocal and well organized, coincide with the most important interest of all—that of the individual.

Some members of the media and of the Congress have declared, in essence, that they know how best to balance these interests, and that Mr. Reynolds, as the agent of the Justice Department and of the administration, does not. They suggest that Mr. Reynolds' personal approach to the office, and his interpretation of the laws that must be enforced through that office, has been unsatisfactory, or even misguided.

I do not believe the evidence is with them. But more importantly, I believe that even those who disagree with the Justice Department's view of the civil rights laws and its opposition to numerical quotas—an idea that is simply antithetical to the American concept of equality of opportunity—must agree that Mr. Reynolds' personal and professional qualifications are beyond reproach.

I am firmly committed to the principle of equality of opportunity for all our people, of whatever race, national origin, sex, or religion. I know that each member of this committee is similarly committed. Indeed, our concern extends beyond our borders, and Senator Kennedy and I have both introduced bills to help end the system of discrimination and oppression against blacks and other minority groups in South Africa.

But, we should all keep in mind that this hearing is not a general referendum on the policies pursued by President Reagan or the Justice Department, or Mr. Reynold's role in executing that policy. It is certainly not a symposium on the meaning of the *Memphis Fire Fighters* decision, though I suspect it may come close to such a hearing. Rather, this is a hearing on the qualifications of Mr. Reynolds to hold the Office of Associate Attorney General. I hope the witnesses will keep that in mind, and I look forward to supporting the nomination.

Thank you, Mr. Reynolds, for coming today, and thank you Mr. Chairman.

The Chairman. We now turn to the distinguished ranking member of this committee, Senator Biden.

Senator Biden. Thank you, Mr. Chairman.

Mr. Reynolds, I am going to start off my questioning today dealing with a Voting Rights Act case, and the reason I do—and let me state it at the outset—is that I am not suggesting that one case out of the many that the division which you have headed the last several years necessarily can have patterns drawn from it. But as you have already detected here, the concern that people have—and it varies in its intensity—is with your intensity of application of the law as you see it.

After we get through the voting rights cases and the civil rights questions, I am later going to move on to other areas, assuming in the second or whatever round of questioning, to determine whether or not you have the same fervor for enforcement of the law, the Constitution as you see it, in matters relating to the environment which you will be in charge of, in matters relating to white collar crime, cases like the Senator from Iowa wants to talk about and E.F. Hutton and other cases.

Quite frankly, the concern is that there is the feeling on the part of you and the administration that the civil rights movement has gone too far, and it is your obligation and job and primary purpose to put the brakes on it and turn it back in another direction, consistent with your interpretation of the Constitution, that that is what is causing, in my humble opinion, the excitement and concern about your appointment to this new job.

The irony is, as you were speaking and explaining your position on busing, the chairman turned to me and said, "Joe, that sounds like you, that sounds like your position on busing."

I happen to agree with you on busing. I happen to agree with you on your view of quotas. What I have questions about is the degree to which you think that the entire civil rights agenda has been promoted too much by this country.

So I would like to start off by focusing on the case of *Major* v. *Treen*. Mr. Reynolds, your record on enforcement of the Voting Rights Act is, I think, a difficult one to pin down. On the one hand, in terms of sheer numbers, as you have indicated, there were, I think you said, 50,000 Voting Rights Act cases regarding enforcement of section 5 of the Voting Rights Act, that your Department had to make judgments on and ultimately, you were responsible for.

But the fact of the matter is, although you should be applauded for the volume, I am not sure that that necessarily indicates anything beyond volume. The fact of the matter is that a vast majority of the pre-clearance cases, as you would acknowledge, are very easy ones to make judgments on; they are not particularly—they are, quite frankly, clear-cut on whether they should go forward or whether you should or should not give pre-clearance.

It is my understanding, for the record, that pre-clearance works roughly as follows. When the jurisdiction submits a voting law change for pre-clearance, first a staff analyst in the Voting Section does an analysis. Then the attorney reviews and either concurs or disagrees. Then the head of the voting section concurs or disagrees. And finally, the papers are sent to you for your decision.

Is that essentially how it works, the process?

Mr. Reynolds. I think that is a correct outline, Senator.

Sentor Biden. I would like to look at the case of *Major* v. *Treen*. And on the record, after reading the case and looking at, quite frankly, only one side of it, because I have not heard your argument yet, it seems to me that at a minimum, you made an incorrect decision, and at a maximum, there are questions about whether or not you intended to in fact accommodate a situation which is, in fact, unconstitutional.

The voting section staff and the District Court found racial intent. Brad Reynolds did not. Why not? The fact of the matter is that the allegation has been made that the evidence that the Governor's redistricting plan was discriminatory in intent and effect was so clear that it is not a question of judgment, and anyone who is dedicated to the enforcement of the law would have had to object to pre-clearance, so your critics argue.

And the first line of questioning that I would like to pursue with you, to be very blunt about it, sets out examples of evidence of discriminatory intent found by the Civil Rights Division staff and later by the District Court, and I am going to ask you whether you were aware of them and give you an opportunity to defend or explain your position.

Mr. Reynolds, this case concerns, as you well know, Congressional redistricting in Louisiana brought about by the 1980 Census. It is known by the name of the court case that it resulted in, *Major* v. *Treen*, and is sometimes referred to as "the Duck District case" for a simple reason—because in fact, the district, just like we used to learn in grade school, the district as it comes out looks like a duck—the famous gerrymandering that we learned about in eighth or ninth or tenth grade, or whatever it was, we learned what gerrymandering was. And in the case of the Voting Section staff, which concluded that there was discriminatory intent, recommended that you object to the plan. After you overruled your staff and precleared it, private parties filed suit under section 2 of the Voting Rights Act, and a unanimous three-judge Federal District Court found discriminatory results, using the totality of circumstances effects test that was enacted in 1982.

What I would ilke to do is run through a number of examples of evidence that your Voting Section staff and later the Federal court found sufficient to establish discriminatory effect or intent, and I would like you to comment on whether you were aware of this evidence and these allegations, and if so, what you did with that information.

According to the documents you produced for us in this case, the Voting Section attorneys and analysts who were responsible for giving you recommendations on the Louisiana plan recommended you object. They did not base their recommendation on a finding of discriminatory effect, since the plan submitted to you was no worse than the districting plan that New Orleans had been operating under for the past ten years. But they did find racial intent, primarily on the part of Governor Treen, about whom they said, quote,

> There is no question but that Governor Treen was heavily involved in the Congressional reapportionment process, and that his actions determined the outcome of the process.

What Treen had done was threaten to veto the so-called Nunez Plan, which would have created for the first time a majority black district in New Orleans. He then pushed the plan that ultimately was enacted, which had less than a black majority in all eight Louisiana districts.

Now, my question is how many analysts and attorneys were there involved in making the initial recommendation to you—if you know?

Mr. **Reynolds**. I only, well, the memorandum is signed by an attorney. I do not know how many——

Senator **Biden**. But you do not know how many analysts in that first rung of the process were involved?

Mr. **Reynolds**. No, I do not.

Senator **Biden**. Do you recall whether or not this issue was discussed by you with the voting section staff?

Mr. **Reynolds**. I certainly discussed the Louisiana redistricting on a number of occasions with people in the Voting Section.

Senator **Biden**. And would it be fair to characterize the disagreement you had with the voting section staff as one of the more serious disagreements you have had in your tenure there with your staff?

Mr. **Reynolds**. Well, Senator, there was serious disagreement on it. I would say that.

Senator **Biden**. Let me ask you this. Let me put it another way. Would you run through for us for the record the arguments as you recall them now that your staff made as to why you should not come down the way you did and what your responses to those arguments were?

Mr. **Reynolds**. Senator, I actually prepared a memorandum setting forth my views on the redistricting that dealt very specifically with the question of intent. I would like to preface my remarks by saying that the district court in this case did not find discriminatory intent; indeed, did not disagree at all with the determination made by the Attorney General. In fact, the district court said that it was not reviewing the Attorney General's determination in this regard, because my determination was under section 5, which had a standard that ws different from the standard that the district court was using. The section 2 provision that was amended by Congress in 1982 went into effect after I had made my determination. The case was brought in the district court under section 2, and the question that the court had was whether or not the Louisiana redistricting had a discriminatory result.

The district court used the catalog of factors that Congress had indicated it should use to determine whether it was a discriminatory result and did indeed make that finding that it resulted in discrimination. Had I had that factor available to me at the time I did the Louisiana redistricting, I might well have decided the same way. But I did not have that. What I had—I am sorry—if I had had that standard available to me at the time that I did the redistricting, I may well have decided the same way that the court did. But Congress had not passed section 2 at that time, and I had only the standard of section 5 available. That one says that you must deny or object to a redistricting if it has discriminatory purpose or effect. And the real question here was whether the redistricting was done with the purpose of discriminating or denying minorities an equal opportunity in the voting process.

We went through that discussion. I met—I am not sure how many times. I certainly met with Governor Treen. I met with a large number of representatives on the other side from Louisiana. I met with my staff——

Senator BIDEN. Excuse me. Excuse me for interrupting you. I will get into a number of these things. But what I want to know is can you tell me what arguments your staff made to you at the first meeting.

Mr. REYNOLDS. I do not have a recollection of any specific meetings. I do have the memoranda here, and I could certainly either go through and review them or read them or whatever you would like. I do not have——

Senator BIDEN. What was their major argument of those in your Department who argued against your position?

Mr. REYNOLDS. The major argument was that the redistricting process that had been engaged in was one where the lines were drawn in a way that purposefully intended to deny minorities the opportunity to—the full or equal opportuninity—to participate in the electoral process.

And my conclusion was that that line-drawing was one that was indeed very much motivated by political considerations, and indeed, wholly by political considerations, and had not been done in a manner or with a purpose of denying or minimizing minority voting strength, but indeed had been driven very much by a lot of political considerations that were inherent at the time.

Senator BIDEN. Was one of those political considerations to protect the district of a Republican Congressman named Livingston, in your opinion? Had you been told that by the Governor that that was one of the——

Mr. REYNOLDS. I think there was an allegation that—no, I do not believe that the Governor—well, I cannot remember precisely what the Governor said.

Senator BIDEN. Did you have any doubt about that—let me put it that way.

Mr. REYNOLDS. I think that district was one that, for political reasons, was the subject of considerable concentration in the redistricting.

Senator BIDEN. That is not quite what I am asking now, Mr. Reynolds. You pointed out that you concluded that there was no racial intent, that it was a political districting that was being done, that it was for political reasons that the district was drawn to look like this. Now I am asking you if, in fact, your view was, was it clear to you, that one of those political reasons to justify this "duck" was to protect a Republican Congressperson—and remember, you are under oath, as I know you do know.

Mr. REYNOLDS. No, I think that Congressman Livingston's district was one that, for political reasons, they drew the way they did.

Senator BIDEN. So when you looked at it, if you are going to put a positive light on it, you said in effect—I am putting words in your mouth now, and I would like to ask you to respond to it–that when your staffers came to you and said, "Look, they are doing this; they are drawing this thing to keep blacks from having power," I assume you essentially said, "No, no. That does not have to do with blacks. That is politics. It has to do with protecting a Republican Congressman."

Is that the essence of the difference of opinion you had with your staff?

Mr. **Reynolds**. Well, it did not occur that way, Senator. Obviously, we went through a rather long, extensive analysis of this, back and forth, and indeed, I think by the time we finished, there was not as much disagreement among myself and the staff as the memoranda that you have been furnished might indicate. But certainly, the difference of opinion that we had was essentially whether the redistricting was done for racial reasons or political reasons.

Senator **Biden**. Well, one of the allegations made in that memorandum concluded that there were allegations, much more blatant evidence of discriminatory intent. For example, they stated an allegation was made by one individual required confidentiality, so I will not mention his name, and it was in the memo, that the legislator was very influential in the majority black district plan, that in fact, he had been told, quote, "We already have a nigger Mayor; we don't need another nigger bigshot," end of quote.

Do you recall whether this allegation or any similar allegations came to your attention through your staff when this matter was in fact before you?

Mr. **Reynolds**. Those allegations certainly were brought to my attention, and they are in the memo, I believe, that you have reference to, and we discussed them at length as to who said them and what was the context, and whether the people who were reportedly saying those statements, whether that could be verified, what their role was in the redistricting process, whether indeed that was made in connection directly with the redistricting process. All of that was explored fully, and we actually had a very long discussion both with people from Louisiana who were opposed to the redistricting, with the Governor and people, officials of Louisiana, and those were indeed aired.

Senator **Biden**. As the chairman would say, my time is up, but let me tell you ahead of time now, with the chairman's permission, that I am going to try to do something that is a little unusual in this process. I am going to try in all my rounds of questioning to stick very precisely, to go through every step of this case. So it is not by way of warning, but just for giving you sufficient notice that I will probably bore you to death.

I am going to go back over a lot of this, and I am going to go through, in the same way we would a trial, very precisely how each of these decision steps was made and what your rationale was for that.

But I thank the Chair.

The **Chairman**. Senator Hatch.

Senator **Hatch**. Mr. Reynolds, some people have claimed that you and the Administration favored granting tax-exempt status to racially discriminatory private schools and that your position in the *Bob Jones* litigation case actually reflected that view.

Would you comment on that particular criticism?

Mr. **Reynolds**. Well, Senator Hatch, neither I nor the administration ever favored granting tax-exempt status to racially discriminatory private schools. Indeed, the President at the time of the filing of the Bob Jones brief in the Supreme Court offered legislation to the Congress seeking to have it made clear and explicit that those schools that engage in discrimination would not be granted tax-exempt status.

The Court had granted certiorari in the *Bob Jones* case in order to review the legal issue of whether Congress had indeed authorized the IRS to deny tax-exempt status to schools that are disciminatory. The position that the Government took was that Congress had not made that authorization explicitly in the Tax Code, and we felt that in terms of the issue that was before the Supreme Court, the separation of powers issue, it had nothing to do at all with the administration being disinclined to deny tax-exemptions to those schools. But we felt that Congress, if it was going to give the IRS authority to do that, would have to do it explicitly rather than implicitly, and we made that argument to the Court; the Supreme Court did not accept the argument.

Senator **Hatch**. Now also, one of the criticisms that you have had to undergo is that you have unjustifiably taken a narrow view with regard to civil rights acts—take, for instance, title IX—and your interpretation of the coverage of Federal antidiscrimination laws, such as title IX of the Education Amendments of 1972, and particularly litigation regarding the *Grove City* case, and that you have resisted legislation to address the *Grove City* decision.

Would you care to respond to that and comment on that?

Mr. **Reynolds**. Well, as a preliminary matter, I would like to say that I think I have been accused as much of taking a too broad view as I have a too narrow view of the civil rights laws and it just depends on who the accuser is.

The *Grove City* case is a perfect example. I received criticism on both sides. There are some who feel that the position that we took in *Grove City* on the first issue—where we came down on the side of saying that a student enrolled in Grove City that received Federal loans was sufficient to say that the school itself received Federal assistance—was one for which we were criticized as having an overly expansive reading of the title IX provisions. On the other issue, as to whether title IX is program-specific or institution-wide, we were accused by a number of critics who said we were being too narrow.

My position has always been that I am to look to the language of the statute and its legislative history and to the best of my ability try to discern what Congress intended and then to make that argument to the Court. And thankfully, in the *Grove City* case, the Court agreed that I was correct on both the first issue, where I was supposedly making too broad an argument, and on the second issue, where I was supposedly making too narrow an argument.

After *Grove City*, as you know, Senator, the Congress undertook through legislation to address the decision. As near as I can determine, most of the concern after the Supreme Court's decision was with respect to the fact that the Court had read title IX as being program-specific, and there was an interest in Congress in making it institution-wide. There is now a bill supported by the administration specifically to do that with regard to the title IX legislation.

There is also legislation that has been proposed under the label of the Civil Rights Restoration Act of 1985, which I believe goes quite a bit beyond addressing the Grove City issues and indeed, it seems to me, tackles a large number of other considerations that Congress may well want to tackle that deal with civil rights enforcement in a variety of different contexts.

Senator **Hatch**. Well, I am a personal witness to how hard you have worked at trying to resolve that issue. The administration and you have always been for the position of overruling the *Grove City* case with regard to institution-wide coverage. And I can remember the long hours, day and night—all night long, on at least one occasion—where you tried to satisfy the other side and tried to compromise and resolve this issue. But it was an unresolvable issue, one with legitimate argument, many feel, on both sides of it.

So I personally feel that the criticisms have not only been unjustified, but they have been unduly harsh and, I think, thoughtless in many ways.

Now, it has been charged that you have improperly refused to enforce title VIII by use of a so-called, effects test, in providing housing discrimination. How do you respond to this particular charge?

Mr. **Reynolds**. Well, our enforcement in the title VIII area has been one where we actually started out, Senator, inheriting a program that had been effectively sent out to the U.S. attorneys offices. All of the title VIII enforcement in housing had been assigned to the U.S. attorneys, and there was not much activity going on. We brought that whole effort back into the Department. Unfortunately, because we had no cases in the department for the first 2 years, there were not many that we filed, but we now are filing those housing cases at a rate that exceeds that of any prior administration.

With regard to your specific question, the whole question of the standard under title VIII is one that the courts have addressed in various ways. The Supreme Court has not addressed it. We think that, clearly, what title VIII forbids is discrimination in housing that is motivated by any racial or color or gender considerations.

In regard to that, we argued in the Court that you certainly can take a look at discriminatory effects as an element to determine whether to infer intent or not to infer intent, and that is certainly the Arlington Heights view of the standard under title VIII, and I think it has been effective in our enforcement efforts:

Senator **Hatch**. You have been criticized for objecting to race-conscious remedies, which have long been relied upon by some of the lower courts. Would you respond to that?

Mr. **Reynolds**. Well, I think it is fair to say that what I am against, Senator, is discrimination, and I view discrimination as the giving of a preference to one individual who is not a victim at the expense of another innocent third party, solely by reason of that individual's race or gender. I think what this administration has done, and certainly, what I have done since I have been in office, is to enforce very vigorously the antidiscrimination laws in all respects, in the employment area as well as in all the other areas. We have gone to court with our arguments. We have been tested in court. Our views have prevailed up through the Supreme Court. Thus, I think that the nondiscrimination standard that we have held to throughout has been one that has been vindicated in our efforts.

I would say that, with regard to employment particularly, one of the criticisms that has been levelled at the Division is that we have abandoned minority interests and have seemed to focus our attention only on nonminorities in the employment area. Of the 52 cases of enforcement actions that have been brought since I took office, 50 of them have been on behalf of minorities and women, and only 2 have been cases that dealt with the reverse discrimination issue.

Senator HATCH. Your critics claim that you are wasting the resources of the Division by seeking to reopen settled cases in 50 jurisdictions that call for goals or quotas.

Now, why are you spending time trying to reopen cases your Department has already settled in court? The question naturally arises—the Justice Department started them to begin with; they were settled in court, and now you are trying to reopen these cases. I think it is important that we get the legal justification for that action on the record at this particular point.

Mr. REYNOLDS. Senator, what we have done is, we have gone back to a number of jurisdictions where there are consent decrees between the jurisdiction and the Department of Justice that have quota provisions. We have alerted those jurisdictions that the Supreme Court in the *Memphis Firefighters* case said that there was a limit on the remedial power of the courts that did not permit courts to order or approve by consent decree quota relief.

We have asked those jurisdictions to join with us to modify their decrees—not to undo what has gone on; not to say that any employment decisions that have taken place under those decrees have to be undone, but simply on a prospective basis, looking forward—to say that hiring and promotions under those decrees for the future, we believe in light of the Supreme Court case, must proceed on a nondiscriminatory basis using affirmative action techniques of recruitment and outreach to increase and enhance the number of minorities and women in the work force. I think that is a responsible position that we are required to take in light of the Supreme Court's decision last term, and we are doing it precisely because of that decision.

I might point out that, when I first assumed the job of Assistant Attorney General, I voiced my discomfort with quotas and quota relief, and with all those consent decrees in place at that time. But I did not think it was proper or correct for me to at that point go into these jurisdictions and seek modification. I thought the responsible thing was to take the issue to court, go through the court system, and wait until the Supreme Court had ruled on the issue, and only after we got a Supreme Court ruling, then go back and negotiate with these jurisdictions, with that Supreme Court decision in hand, and on that negotiated basis, arrive at a revised consent decree that conformed with the Supreme Court decision.

Senator HATCH. That is the *Memphis Firefighters* v. *Stotts* case?

Mr. REYNOLDS. That is the *Memphis Firefighters* case.

Senator HATCH. So under your interpretation of that case—which I do not think anybody would question as being sincere—you believe that literally, the Court has ruled, and it is your responsibility to enforce the law, or at least to implement the law in accordance with the ruling of the Court?

Mr. REYNOLDS. I believe, Senator, that that is correct and that the ruling of the Court is as I have suggested.

Senator HATCH. You know as well as I that there are those who differ with you, and they are entitled to their opinions, and it is an interesting issue that really is going to continue to be fought out, it seems to me, in the courts of this land.

Mr. REYNOLDS. I believe that is correct—and I think that is where it should be fought out. Again, we went back and we asked these jurisdictions for modification. What we have done where there is a disagreement is rejoin the issue in court, which is the responsible thing, I believe, for the Justice Department to be doing, and to have the courts resolve for us in the final analysis what the proper reading is of the *Memphis Firefighters* decision. And we think that that is the way in which to get these kinds of matters clarfied. So we have taken it back to court.

Senator HATCH. I was one of the authors of the Civil Rights of Institutionalized Persons Act. Now, what are your responsibilities as you view them under the Civil Rights of Institutionalized Persons Act, and how have you carried them out?

Mr. REYNOLDS. Senator, that statute authorizes the Attorney General to bring actions in those situations where people are civilly or criminally institutionalized, and the conditions are flagrant and egregious violations of the Constitution or Federal law. I have to say that the act was passed in 1980, and I think that the enforcement effort by the Division and the section that has been assigned to institutionalized persons over the past 4 years is truly remarkable.

We have investigated a large number of institutions, including prisons, mental health institutions, juvenile detention centers, and nursing homes, and we have gone into each of those particular institutions and sought through the effort of negotiation in the first instance, and litigation, if need be, to bring those conditions in to conform with the law.

There has been a dispute as to whether we should have rushed to court sooner rather than later. However, based upon the way the Congress wrote the statute, Senator, we are not at liberty to use litigation as a first resort. There are a large number of very technical comprehensive procedures that the Attorney General must follow and must certify that he has followed well before he can even take the case to court, and those procedures are all designed to try to accomplish a conciliated or negotiated result well before you get to court. I think that makes good sense from Congress standpoint. I think that is a sensible piece of legislation. We have seen, before the act was passed, these cases thrown into court and litigated for 8, 10, 15 years, and no attention paid to those people who are in the institutions during the course of that litigation. What we have accomplished by emphasizing the negotiation route is to bring these States to a recognition that there are deficiencies, to commit voluntarily and cooperatively to clean those deficiencies up, and to go to their legislatures and get millions of dollars to devote to these institutions. I think that course has been one that, as I say, has been a truly remarkable enforcement effort.

Senator **Hatch**. Well, my time is up, but I was the one who wrote those procedural approaches so that the States would not feel like they were being dumped on by the Justice Department.

But I appreciate the answers that you have given here today. I think that if they have been listened to, and if people will read them, they will understand that you have been sincerely enforcing the civil rights laws as you see them, in the best possible way you possibly can. And even though others disagree with you because they sincerely believe otherwise in the interpretation of some of these laws, that is hardly a reason to withhold or try to stop your nomination.

Thank you, Mr. Chairman.

The **Chairman**. Senator Kennedy.

Senator **Kennedy**. Thank you very much, Mr. Chairman.

Mr. Reynolds, as you know from our own private conversations and visiting before this hearing where I outlined to you the concerns that I have, I am very much troubled by the pattern of your overruling the career attorney on a number of important civil rights issues, including voting rights cases, the *Bob Jones* case, and title VII consent decrees. In many of the cases, when the judicial system considers your argument, you are rebuffed. In reviewing your work in the Civil Rights Division, I think that there is a very troublesome pattern. I would like to get some better understanding of the reasons for the positions which you have taken.

In the *Bob Jones University* case, how could you possibly justify granting tax benefits to racist schools?

Mr. **Reynolds**. Well, Senator, I cannot justify that. I am opposed to that and have been opposed to that, and indeed, the administration's position throughout was that tax-exemption should not be granted to schools that discriminate on account of race, and legislation was proposed to that effect.

Senator **Kennedy**. Could you tell us what role you had in instigating the administration's scheme to reverse the longstanding IRS policy against subsidizing race discrimination?

Mr. **Reynolds**. Well, the IRS policy that you are referring to, Senator, is one that actually was put in place in 1970, after 20 years before that of having a contrary policy.

The courts had not spoken to it, and the Supreme Court said that it did indeed want to review that issue. The question that was before the Court was whether Congress had authorized the IRS to deny tax exemptions to schools that are racially discriminatory.

We took a careful analysis of the law and the legislative history. We could not in good conscience find that Congress had taken that step. We felt that at best it was implicit in the particular provision in question, that it was not explicit, and that there would be a great deal of legal authority to the effect that Congress has to delegate those kinds of public policy decisions explicitly to the executive branch in order for it to carry them out. Because of the separation of powers issue that was involved, it was our view that the proper argument to make to the Supreme Court on the separation of powers issue was that indeed, Congress had not delegated that authority.

Senator **Kennedy**. Are you familiar with the fact that there were 11 pieces of legislation that were introduced in Congress to overrule that IRS ruling, and not one of them was even reported out of committee? What kind of weight did you give that legislative history?

Mr. **Reynolds**. To overrule the——

Senator **Kennedy**. Yes, the IRS position in terms of the prohibition of using taxpayers' funds in the segregated schools. Over the period of time when this ruling was in effect, there were a number of pieces of legislation to overrule the IRS position but none of them ever even came out of committee. And I am wondering whether you are familiar with that legislative history and what weight you gave it.

Mr. **Reynolds**. Senator, that I am familiar with. The question before the Court, though, was a provision of legislation that had been enacted by Congress, and the inquiry for the Court was whether the Congress that passed that legislation intended or did not intend to delegate this kind of authority.

What other post-legislative activity might have occurred that did not result in legislation did not bear on the fundamental question before the Court as to the intent of the Congress that originally passed the 105(c)(3) legislation.

Senator **Kennedy**. The Senate Select Committee on Education, which is bipartisan, reached virtually the unanimous conclusion that with regard to this IRS regulation that firm steps should be taken to enforce the policy, and noted that the Court's affirmance in *Coit* v. *Green* firmly establishes the legal standard. I just wonder, since Congress never acted on legislation to overrule the IRS, and the bipartisan Select Committee on Education reaffirmed that position, why you were so troubled in your own mind about the failure of at least some legislative delegation on this. If, as you said earlier, you deplore giving tax exemptions to segregated schools, and the administration was opposed to it, why you were so troubled by the failure of legislative action, given what the history had been in the Congress, that you felt that you had to move in that area and overrule the IRS? I think it is appropriate to address the allegations that have been raised that your decision to overrule the IRS was in response to political intervention. I would give you an opportunity to speak to the representations that were made by Mr. Lott in the Republican Platform and the memo prepared by two staffers who were special assistants to the Attorney General, who on this issue sent you the notes, "Ken, Reference Bob Jones University, I just ran across the attached relevant statements in the Republican Platform and the Reagan-Bush position papers, and I have sent copies." And the other staffer highlighted the following portion of the Platform: "We will halt the unconstitutional regulatory vendetta launched by Mr. Carter's IRS Commissioner against independent schools."

Did those notes in those recommendations or those memoranda have any influence on your decision?

Mr. **Reynolds**. Senator, my participation and involvement was strictly on the legal analysis side. As I have indicated to you, I believed it was a separation of powers question. The Supreme Court had asked to review that question. We were parties in the Supreme Court. At the time that we did it, we sent legislation to the Congress to make it clear that we did not tolerate tax exemptions to schools that discriminate, but at the same time, on the legal issue, we advised the Court that we thought that Congress had not delegated this authority to the IRS and that it was necessary under the separation of powers for that kind of delegation to be made explicitly rather than implicitly. The Court disagreed with that legal argument, as we all know, and we certainly abide by the opinion of the Supreme Court.

Senator KENNEDY. Well, clearly, then, we will conclude that you were not relying on the legal analysis of Bruce Fine and Carolyn Kuhl, who sent you the notes with regard to the Republican Platform and the other statement about Mr. Carter's IRS—were you or were you not relying on their legal analysis?

Mr. REYNOLDS. I was relying on my own legal analysis, Senator.

Senator KENNEDY. With regards to the section 5 of the Voting Rights Act preclearance a change in the Selma polling place, as you remember, the polling place was moved from a community center in the black community within walking distance to most black voters to the courthouse in the white community a mile away, a scene of past racial tensions. And you probably remember the very extensive memo that was given to you from your own staff where the alleged reasons for the changes were explained as a shortage of parking spaces and also confusion as the old polling place. Your staff, as I understand, visited the old and new polling places and, they point out in their memorandum to you that there is much more parking in the previous area rather than as the Courthouse Annex. In the interviews your staff conducted with the people who had been working in that center, Ms. Grindell explained that she had never had reason to complain that voters interfered with the administration of her program or that there was confusion. Your staff's memorandum reviews the voting pattern for the number of individuals who voted in various elections, comparing those with other wards and precincts in Selma the memorandum and it reaches this conclusion:

> The decrease—that is, the number of blacks in the new area—can only be attributed to the relocation of the polling place as the turnout of other black precincts has remained essentially the same throughout the same period. The drop in black voter participation can be attributed to the increased inconvenience and the new location selected has been confirmed by virtually every black person with whom we have spoken during our review. The County has not met its burden of showing that the change does not have a discriminatory effect on black residents.

And then in the conclusion of your own comments—and I will ask that the whole memorandum be included as part of the record, Mr. Chairman—but you mention in your own comments, in your own handwriting, "The drop-off in voter turnout does not raise adverse inferences. Certainly, there is no reason to leap to the fanciful conclusion that it can reasonably be attributed to the polling place change."

Now, given that I think any reasonable review of your staff's memorandum would reach complete contrary conclusions, and did reach contrary conclusions, what was the basis of your reaching that conclusion?

Mr. **Reynolds**. Well, Senator, I reviewed that very carefully. The move was three-quarters of a mile down the road to the Court Annex. It was one that was easily accessible to everybody——

Senator **Kennedy**. Do you know what it cost the black voters to take a cab there? Do you remember that part?

Mr. **Reynolds**. Well, there was something in the memo that said it was a $5 ride for three-quarters of a mile down the road, but I think when we did further inquiry on that, there was some question as to whether that was indeed the case.

But obviously, it is our responsibility to see if there is anything that dilutes the opportunity of minorities to participate in the process. Certainly, access to the Selma courthouse is something that everybody agrees is open and available. We send observers to these voting areas on a regular basis to ensure that there is no intimidation that goes on of any sort, and I felt that there was no basis to conclude by moving that polling place the distance that they did, three-quarters of a mile, to a much less congested area, I might add, that it would warrant an objection.

Senator **Kennedy**. Well, as I understand, your own observers did report intimidation.

What is your analysis of the decline in the voting participation? It was very extensive, and were it not for time constraints, I would track every one of those instances that are raised by your own staff. They reviewed a series of local elections. They compared the different precincts, and they showed a very significant drop in participation. It wasn't just one election; it was a series of elections.

How do you reach your own conclusion when any fair or reasonable reading of your staff's memorandum would dictate the opposite result? Did you talk to other people?

Mr. **Reynolds**. Well, Senator, I talked to a lot of people on this before reaching the decision. One of the problems——

Senator **Kennedy**. Can you tell us who, or what groups?

Mr. **Reynolds**. Well, I do not have the names. I think on this one, we talked to——

Senator **Kennedy**. I indicated to you before, I think, that we were going to raise these questions.

Mr. **Reynolds**. I understand that. On this——

Senator **Kennedy**. I would just like to know what weight you gave to the others that you thought overrode your own investigators.

Mr. **Reynolds**. Well, I think one of the problems you have with regard to the whole section 5 review is that voter turnout figures——

Senator **Kennedy**. Could you answer the question?

Mr. **Reynolds** [continuing]. Am trying to, Senator—voter turnout figures are things that are very hard to ascribe too much significance to, because there are any number of reasons why people may or may not turn out for a particular vote on a particular day. And therefore, as a general matter, we do not ascribe significant weight to that particular factor.

The move of the polling place is something that the local authorities certainly had reason to do. They moved it to the Courthouse Annex, and we have observers there to insure that those individuals who want to vote will be able to go there and vote freely and openly.

Senator **Kennedy**. Mr. Chairman, my time is up. But in terms of this particular reference, I would like to include the part of the memorandum that indicated that there was harassment of black voters, and that was included in the earlier memoranda.

I have further questions, but I will have to come back for another round.

The **Chairman**. The distinguished Senator from Pennsylvania, Mr. Specter.

Senator **Metzenbaum**. Mr. Chairman, could you give us some advice on what hour you are going to?

The **Chairman**. I think we had better recess after Senator Specter gets through.

Senator **Metzenbaum**. What time are you going to come back?

The **Chairman**. Two o'clock.

Senator **Metzenbaum**. I thank you, Mr. Chairman.

The **Chairman**. Senator Specter?

Senator **Specter**. Thank you, Mr. Chairman.

Mr. Reynolds, I would like to pursue your interpretation of the so-called *Memphis Firefighters* case, and you had quoted briefly from the opinion, and that part that you picked up on followed the statement by the Court that, quote, "Our ruling in Teamsters that a court can award competitive seniority only when the beneficiary of the award has actually been the victim of discrimination...the policy behind section 706(g) of title VII," so that the matters that you quoted immediately following that were in the context of competitive seniority as opposed to the broad range of cases which you have sought to reopen. And it is obviously hard in reading the opinion of the Supreme Court in the *Firefighters* case and other predecessor cases and the courts of appeals 'opinions, to draw any hard line.

But in the context where three other circuits have interpreted the *Firefighters* case differently from you, the question that I have is why you disagree with those circuit opinions. And I think it might be useful to make a fairly brief reference here.

In the Second Circuit opinion in *EEOC* v. *Local 638,* at page 1185 of 753 Fed Second, the Court denies the contention that, quote, "Stotts eliminates all race-conscious relief except that benefitting specifically identified victims of past discrimination."

The Eleventh Circuit, in the case of *Turner* v. *Ore,* in the slip opinion, refers to the Secretary's contention about a promotion and back pay in the absence of a finding that the complainant suffered actual discrimination and rejects the make-whole relief approach.

In the case of *Vanguard* v. *city of Cleveland,* the Court of Appeals for the Sixth Circuit says about the same thing and refers to historical patterns of racial discrimination and promotions in the City of Cleveland Fire Department at page 45 of 753 Fed Second.

And the Sixth Circuit again, in *Starke* v. *Lambert,* comes to a conclusion squarely differing from yours when it says in the final paragraph, quote:

> This Court holds that against the long history of patently racially discriminatory hiring practices of the Detroit Fire Department, the voluntary race-conscious affirm-

ative action plan of the Detroit Fire Department and Civil Service Commission after 1972 did not violate any applicable Federal, Constitutional or statutory provisions.

And in those four cases, interpreting the *Memphis Firefighters* case by the Second, Sixth, and Eleventh Circuits, they flatly disagree with your reading. And my question to you is how do you justify your own interpretation, Mr. Reynolds, and the pursuit of the argument you have made, in the face of those Circuit opinions?

Mr. **Reynolds**. Well, Senator, I agree with you that those three Circuits do disagree with my reading of *Stotts* or the *Memphis Firefighters* case, at least insofar as it has application to consent decrees, although I believe two of those Circuits also acknowledged that if they were dealing with a court order after full litigation—that is, a litigated decree—that the Memphis Firefighters case may well have application in the promotions area. So it is not even altogether clear from those Court of Appeals decisions that they have arrived at the conclusion that promotions and hiring are not subject to the Sureme Court's directive in the *Memphis Firefighters* case.

But I think it is fair to say that as to consent decrees, those three circuits have indeed arrived at the conclusion that the *Memphis Firefighters* case does not require that you remove quotas from–in all those cases, I think they were 1-for-1 quotas—the area of promotions. I would simply state to you, Senator, that in those circuits, we have no plans to commence additional lawsuits at the district court level in order to achieve further modification of existing quota provisions in court orders or consent decrees until after the appellate court decisions have been reviewed and become final, or the Supreme Court has had an opportunity to give more clarification in this area.

Senator **Specter**. Well, Mr. Reynolds, is it really though much of a concession not to pursue cases in those circuits? Haven't those opinions pretty well foreclosed you from doing that, at least in the second, sixth, and eleventh circuits?

Mr. **Reynolds**. Well, I think that for all effective purposes, certainly the district courts are bound by those circuit court decisions, so we would not be going into the district courts to ask them to do something contrary to what the Circuit ruling is.

Senator **Specter**. Mr. Reynolds, after you and I had met a couple of weeks ago, I took a look at your confirmation hearings, where the question of affirmative action was raised, and I had not called this to your attention at that time and would have if I had known about it, but I am sure you are familiar with it in the general sense. As it appears in the hearing back on June 19, page 90 of the record, I had asked you about your interpretation of voluntary action, and you had replied in this way:

> I think that those people who potentially were subjects of that discriminatory conduct should also be put back into the position that they would have been in had there not been that discrimination.

And my question:

> Therefore, you would view the power of the Civil Rights Division to implement a policy of affirmative action where discrimination had placed one particular group or another in a less-favored position than they would otherwise have been?

And Mr. Reynolds, responding:

That is correct, where there has been a determination of discrimination and a showing of injury or potential injury as a result thereof.

Then, at a followup hearing on July 17, Senator East was concerned about that as it might have opened the doors for quotas, which was not my intent, and you then answered him that it was not your interpretation.

But the concern that I have is where you had used the term, "potentially were subjects of discriminatory conduct" and had talked about one particular group or another in a less-favored position.

Where you had the discretion, Mr. Reynolds, as you do very broadly as a prosecuting attorney, why did you retreat, if you agree with me that you did retreat, from that position, to look for the make-whole theory or for actual discrimination or evidence that a specific claimant or plaintiff was discriminated against as opposed to a broader remedy for a whole group?

Mr. REYNOLDS. Senator, I am not sure there has been any retreat. I do not have the passage before me that you read, but it seems to me that——

Senator SPECTER. Would you like to see it, Mr. Reynolds? I would certify I read it accurately.

Mr. REYNOLDS. OK, no, I am not questioning that. I was simply going to make the point that I do think that affirmative action relief should be available for those individuals who have been disadvantaged, and my idea of affirmative action relief is that in its traditional sense it emphasizes recruitment and outreach programs of the sort that is going to ensure that those individuals who have not indeed been notified of employment opportunities or had an opportunity to compete for those employment opportunities will now get that opportunity. As a result they will be brought into the applicant pool, and they can compete on a nondiscriminatory basis. I feel today as I did at the time I was here before, Senator, that a particular group of disadvantaged individuals or potentially disadvantaged individuals who have not had those kinds of opportunities should indeed be afforded them through a very aggressive affirmative action program of the sort I describe.

Senator SPECTER. Mr. Reynolds, the Department has notified some 51 jurisdictions that there would be a pursuit of your interpretation of the *Memphis Firefighters* case. And there has been a response from a fair number of State and local officials of objection to that because whatever the technical view of the law may be, the consent decrees or the orders have reasonably well laid these issues to rest in a great many communities.

What response do you have to the kinds of comments which have come from these local officials who would prefer to let these matters remain where they are in terms of having worked out on a practical basis whatever problems existed in these communities?

Mr. REYNOLDS. Well, Senator, obviously, when we wrote the letters to these jurisdictions and sought modification, our interest was in doing it, to the extent possible, with their agreement. I can understand the discomfort and stress that some have expressed with this effort, but as I say, it was the Supreme Court's decision that prompted these letters.

We are not trying to undo or disrupt anything that has gone on in the past, but these decrees are indeed in place for a period of time, for a number of years, for the future, and it seems to me that in light of that, and in light of the fact that they do contain quota provisions that will come into effect and have application for future hires and future promotions, we want to be sure that at that time when those future hires or future promotions occur, that they are done on a nondiscriminatory basis.

Senator SPECTER. Mr. Reynolds, there is a great deal of concern about what your policies would be as Associate Attorney General—of course, they would be the same as Assistant Attorney General, as head of the Civil Rights Division—if you pursue these matters.

There was a resolution made by Senator Metzenbaum in the Judiciary Committee to try to promote a sense of the Senate resolution to leave all of these cases in their current position. And I think everyone respects your conviction about taking the case back to the Supreme Court of the United States, to see if your interpretation of the *Memphis Firefighters* case is correct or if the interpretation of the 2d, 6th, and 11th circuits is not correct.

And the question which is on my mind, which you and I, of course, discussed before, was whether there might not be some modification of your policy not to unsettle what has happened in these 51 communities, at least until you have taken the case back to the U.S. Supreme Court so that there can be a determination as to whether you are right or wrong, because if you are wrong as the Supreme Court would decide it, then those local matters would remain where they are. And if you are proved to be right, contrary to what many have asserted, and my own view of the cases, then you would not be going after them if you turn out to be wrong—and if you are right, then of course, the Court having decided it, absent a congressional change, you would be at liberty to pursue it.

Mr. REYNOLDS. Well, Senator, our interest and our only interest is to ensure that the law is clarified, and the reason we have gone to court in those instances where we have is to bring the matter back to the court for clarification. I think the issue has been joined now, certainly in the three circuits that you mentioned, and we have cases that have been started in the district courts, and our sense is that with the issue joined in the courts that we are now in, our intention is not to precipitate similar such litigation of this sort. I think that it is the case, obviously, that there is consent decree language that is in existence, and it may well be that at the time an employer faces future hiring or promotion situations that that situation might itself require that some additional court action be taken. But we are not interested in going out and calling a whole lot of jurisdictions into court and different fora in order to test the issue. I think we feel that we have it on track and, in fact, in litigation, and the issue has been joined.

Senator SPECTER. Mr. Chairman, might I have just another 2 minutes? I think we are on a rather important point that I could finish up here promptly.

The CHAIRMAN. Yes.

Senator SPECTER. Mr. Reynolds, your statement that the Department of Justice would not precipitate anymore cases of this sort, I think could be a very significant change of position on this issue if by that you mean that the Department of Justice will not initiate anymore litigation on any of the 51 cases that you had initially written to until there is a clarifying decision by the Supreme Court of the United States, upholding your specific position.

Mr. REYNOLDS. Well, I am not sure how long it might take the Supreme Court to address the issue, Senator, so I do not know how long that would be. I am saying to you that we are not going to pick fights in this area with jurisdictions on this issue. We do have a number of jurisdictions that are talking to us about these matters and who are willing to join with us and go into court on a modification. And if we do that, and some third party comes in and seeks to litigate the matter, that would result in litigation.

There will be, I suspect, some circumstances where the application of the consent decree could well, for a host of reasons, require that further litigation occur on this issue in the district courts.

But we are not going to be out there picking fights with jurisdictions simply to generate more litigation on this, and to churn up additional lawsuits in different courts around the country on this particular issue.

Senator SPECTER. Well, Mr. Reynolds, I think that is a very significant position. Using your expression, "pick fights", critics have said that that is what you did with these 51 letters, and you have taken it to a certain position where we are now. And if you are not going to pick anymore fights beyond this point until there is a Supreme Court decision, that could reasonably well lay this matter to rest in substantial part, if you are not going to initiate anymore litigation unless someone else brings up the issue in one of the courts where the balance of these 51 matters are pending. Is that your position?

Mr. REYNOLDS. Well, again, I think we are saying similar things, although I also would have to say that if a jurisdiction under a consent decree that had a quota provision announced that it was going to commence hiring or promoting pursuant to that quota provision, and we were a party to the consent decree, that might well require some additional litigation.

Senator SPECTER. Well, but it would not be at your instigation; it would only be in response to what someobdy else does?

Mr. REYNOLDS. It would be in response to that kind of an assessment. But I think most of these consent decrees are ones where the decision as to additional hiring and promotions are some point down the line, and we may well get some clarification by the court before that kind of a situation would confront us.

Senator SPECTER. Thank you, Mr. Reynolds.

Thank you, Mr. Chairman.

The CHAIRMAN. Mr. Reynolds, on that point, I believe you have initiated an action on the matter that is being discussed. The courts will make a decision on that, and that could end up in the Supreme Court of the United States. So the courts will decide this, will they not?

Mr. REYNOLDS. I think that is correct, Senator.

The CHAIRMAN. And if your position is upheld, you would be in a position to proceed in other cases if you wanted to do so or felt the need to.

If the courts reverse that, then of course, you will know where the court stands on that particular question.

So I see no need for the Judiciary Committee to take any stand on that, because I think it is a matter for the courts. Is that the way you construe it?

Mr. **Reynolds**. Well, I think it definitely is a matter for the courts. It is a question of how the courts, and ultimately, the Supreme Court, understand the *Memphis Firefighters* decision.

The **Chairman**. Now, I have a letter here from William French Smith, the former Attorney General who just went out as Attorney General recently, that I am going to read into the record.

DEAR MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE ON THE JUDICIARY: I write to offer my unqualified support to the nomination of Mr. William Bradford Reynolds as Associate Attorney General of the United States. During my four years as Attorney General, I knew no finer public servant than Brad Reynolds. The policies he vigorously supported as Assistant Attorney General for Civil Rights were the policies of the President.

Both the President and I stood behind him completely. What Brad Reynolds has accomplished in the Civil Rights Division deserves commendation. Under his leadership, the Division has faithfully interpreted and enforced the civil rights laws of the nation. Mr. Reynolds has helped return us to the original undertaking of the civil rights legislation. His clear articulation of the principles of nondiscrimination and his energetic pursuit of the practice of nondiscrimination in American society will prove to be a lasting contribution to our national commitment to full civil rights for all Americans.

There should be no doubt that the Senate will quickly and enthusiastically support the President's nomination of Brad Reynolds as Associate Attorney General. His character and ability to hold office are beyond question:

To make the policies of the President an issue in Mr. Reynolds' confirmation process would be unfortunate. His competent enforcement of the President's policies in civil rights has earned him the respect and support of the President for this new position. He deserves the unqualified support of the Senate.

I recommend him to you without reservation and with great enthusiasm.

Sincerely,

WILLIAM FRENCH SMITH.

[Letter follows:]

WILLIAM FRENCH SMITH
333 SOUTH GRAND AVENUE
LOS ANGELES 90071

June 3, 1985

Senator Strom Thurmond
SR-218
Russell Senate Office Building
Washington, D.C. 20510

Committee on the Judiciary
SD-224
Dirksen Senate Office Building
Washington, D.C. 20510

Dear Mr. Chairman and Members of the
Committee on the Judiciary:

I write to offer my unqualified support to the nomination of Mr. William Bradford Reynolds as Associate Attorney General of the United States. During my four years as Attorney General, I knew no finer public servant than Brad Reynolds. The policies he vigorously supported as Assistant Attorney General for Civil Rights were the policies of the President. Both the President and I stood behind him completely.

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I recommend him to you without reservation and with great enthusiasm.

Sincerely,

William French Smith

William French Smith

The CHAIRMAN. The distinguished Senator from Utah?

Senator HATCH. Mr. Chairman, I would just like to observe that in my 9 years on this committee, I have not seen a better witness answering questions in the most difficult and complex and controversial and debated area of law that comes before this committee.

And I want to personally compliment you, because I think it is tough to appear before this committee. There are a lot of very intelligent people on this committee who have very deep feelings on the various sides of these issues. And I do not know how anybody who has sat here this morning and taken time to listen to you and has heard your answers would draw any other conclusion than that not only are you sincere, but you are a real expert in this area, much more so than anybody on this committee. And, although I may disagree with you on occasion with regard to interpretation of civil rights laws—which is all right to do—the fact of the matter is that you have been upholding this position in the highest traditions of justice and in the highest traditions of personal integrity and belief.

So I just want to personally compliment you, because I think you have answered the questions forthrightly and I think in a moderate and reasonable fashion, and although I certainly make room for disagreement with your positions by those who feel strongly the other way, I think they have to be honest and admit that there are two sides to these issues, basically, and that there are legitimate arguments on both sides in many respects, and that there are good, sincere, decent people who believe in civil rights and who believe in upholding antidiscrimination laws, who happen to differ on the interpretations of these statutes.

So I just want to personally tell you that that is my feeling after this first number of hours that we have listened to you, and I will be interested in listening to you for the rest of your confirmation proceedings.

The CHAIRMAN. Senator Hatch will take charge of the hearing beginning at 2 o'clock. I have got to go onto the floor of the Senate on the defense bill. I want to thank you, Senator Hatch, for doing that.

Mr. Reynolds, I want to commend you for the manner in which you have conducted yourself this morning. I have found you very fair and very competent in the work that you have undertaken with this Judiciary Committee since I have been the chairman, and that began when President Reagan came into office in January 1981.

I admire the fact that you feel there should be no discrimination, no favoritism to anybody because of their race, creed, or their color; in other words, uphold the Constitution and treat everyone fairly and squarely, without discrimination of any kind. And I want to commend you for following that course of action, and I am sure you will continue to follow that course of action as long as you are in public office.

We now stand in recess until 2 o'clock.

[Whereupon, at 1 o'clock p.m., the committee was recessed, to reconvene at 2 o'clock p.m. this same day.]

AFTERNOON SESSION

Senator **HATCH**. We will reconvene this hearing.

I apologize to you for being just a little bit late, Mr. Reynolds, and to other members of the committee, but we were all in party caucuses, and this is the earliest I could get here.

We will now turn to Senator Metzenbaum whose turn it is now to ask some questions.

Senator **METZENBAUM**. Mr. Reynolds, I have questions that cover some of the area that Senator Kennedy spoke to. I had the feeling this morning, on the Selma, AL, matter, that your reaction actually was blase or bland. Here's an instance where there was a polling place, in a black area, and it was moved to the courthouse in a white area, far less convenient, and black voting fell from 55 percent in 1980 to 39 percent in 1982, and 36 percent in 1984.

The all-white commission decided to move it after an election in which blacks won half the city council seats. In the next election, the city council election after the move, produced a clear white majority. Frankly, Mr. Reynolds, that was dirty pool. That was a dirty deal. There's no other way to describe it. It was just a dirty deal. And after the election, the black leaders realized the change should have been cleared by the Justice Department, and after the investigation, your career lawyers recommended that the polling places be returned to the black community location. You rejected their recommendation. I'm frank to tell you, that was shameful, shameful on your part. I'm embarrassed for you.

I guess I would wonder how you would react, what your reaction would be, if the polling place in your community, where you vote, was moved into an all black area. Would you not have a totally different kind of reaction than you had when you approved of this move from the black area, right in the heart of it, down to the courthouse? How would you feel if they moved your polling booth into a totally black area of Washington or wherever you vote.

Mr. **REYNOLDS**. Senator, this particular change was to move the polling place to the courthouse which——

Senator **METZENBAUM**. I can't hear you. Why don't you pull that closer to you.

Mr. **REYNOLDS**. I'm sorry. Excuse me, Senator. The change was to move the polling place to the courthouse annex, which I think is as neutral a place as one could find to put it. It was placed there because of congestion problems and parking problems where the polling place was originally, and it was all of three-quarters of a mile down the road. When we looked at it, we couldn't find any basis to ascribe a racial purpose to the move, and the only question was whether it might be retrogressive or dilutive. There was no basis that we could determine for saying that there was a dilutive impact by reason of moving a polling place that distance to the courthouse annex.

Senator **METZENBAUM**. You received a report, didn't you, that there was harrassment, and intimidation of the blacks, when they attempted to vote in the courthouse?

Mr. **REYNOLDS**. Actually, the report was that there were some instances—I think it was two incidents to be specific that our observers did find with respect to voting at that polling place afterward.

That is, of course, why we have observers there, and those instances occur in many polling places. It is not a product of a polling place location, but rather a product of the individuals who were there and who staffed the polling places, which is precisely why we send observers out, to make sure that those matters do not prevent people from voting.

Senator **Metzenbaum**. You were told by your investigator about the white inspecter at the polling place: "Observers reported he was often hostile to black voters and called law enforcement officials repeatedly." Didn't that bother you?

Mr. **Reynolds**. Senator, that does bother me, and that's why we have observers. I believe the same individuals that are discussed in that report would also be the individuals that were manning the polling place, had it been moved three-quarters of a mile back down the road to where it was originally. The people who do indeed run the polling places would be the same people, in any case, and if those instances were going on, they would have occurred, I'm sure, in either location. That's why we have observers, in order to be sure that we prevent and stop that, and that nobody is denied the opportunity to vote at the particular locations.

Senator **Metzenbaum**. Mr. Reynolds, that observer, speaking up in the total black community, would speak with far less efficacy than he would with the sheriff's office located right across the hall, wouldn't he, realistically?

Mr. **Reynolds**. Senator, I can't speak to that. I do know that we had observers there, and as soon as he spoke up anywhere, whether it was in a black community or white community, our observers would be quick to react, and it would not be with any greater or less efficacy, that his remarks would carry any influence or weight.

Senator **Metzenbaum**. And a fall off from 55 percent to 36 and 39 percent didn't mean a darn thing to you, did it?

Mr. **Reynolds**. Well, I'm not sure why people choose to go to the polls or not go to the polls on a particular day of election, Senator, but I think that the location of the polling place is not what's instrumental to the fall off. I think that fall off of voting can be triggered by any number of circumstances.

Senator **Metzenbaum**. Did the city of Selma submit to the Department a request to move the polling place from the center of the black community to the courthouse?

Mr. **Reynolds**. I believe it was not submitted when the change was made, that that submission came in sometime afterwards as a result of our efforts, and the efforts of the Division itself, where we made specific requests to the local authorities to submit the change.

Senator **Metzenbaum**. Did the staff lawyers in your Division recommend that you refuse to approve the change?

Mr. **Reynolds**. That was the recommendation of some members of the staff at the Division.

Senator **Metzenbaum**. Not some members. Wasn't it the recommendation of the staff lawyers as a group?

Mr. **Reynolds**. No, Senator. It was a recommendation only of the staff lawyer that had the responsibility for that particular voting change that was under submission.

Senator **Metzenbaum**. It was a recommendation of that particular staff lawyer that had the responsibility?

Mr. **Reynolds**. Well, that, or those. I'm not sure how many of the lawyers in the Division worked on it.

Senator **Metzenbaum**. So it wasn't some. It was that group of lawyers who had the responsibility. They recommended against it. Brad Reynolds, hero, comes in and approves of the change, is that right?

Mr. **Reynolds**. I did approve the change. That's correct, Senator.

Senator **Metzenbaum**. Let me read to you from that staff memo:

> The evidence demonstrates the retrogressive effect of the change. This large, predominantly black polling place has been moved out of a most desirable location situated in the black residential neighborhood, and into the Dallas County courthouse annex located in the white section of downtown Selma. The increased inconvenience effected by the change has resulted in a significant decrease in black voter turnout in this precinct, demonstrated by a comparison of elections held before and after the county and city implemented the change.

Going on.

> In addition, there was evidence—this is from your staff—there was evidence, unrebutted by the county, that the change was racially motivated.

Let me remind you of some other specific facts that your staff found. Your staff analyzed the county's explanation for the change.

First the county said they moved the polling place because there was insufficient parking at the community center in the middle of the black community.

Your staff found that many black voters, particularly elderly residents, could easily walk to the community center. That there were two parking lots near the community center, as well as side street parking, but that the courthouse was downtown at a busy intersection where parking was a well-known problem. According to your staff, the second justification by the county was that there were so many activities at the community center, particularly local residents picking up food stamps, that there was too much confusion for the voters.

Your staff talked to the manager of the Food Stamp program who said she had never heard of a complaint about confusion, and that there was plenty of space in the community center to conduct voting on voting days, as well as to conduct other activities.

In contrast, your staff found that there was very little room at the courthouse annex, it became quite congested on voting day, and the county sheriff's office was directly across the hall from the polling place.

I have to tell you: These are some of the flimsiest excuses to move a polling place I have ever heard. Your staff found:

> That the proposed change has a discriminatory effect on the voting strength of the blacks in that precinct. This effect has been demonstrated in county and city elections held in the past several years.

Despite that, those recommendations, you decided not to object, and you wrote:

> The 1980 change in the polling place to the courthouse annex suggests no discriminatory effect.

Where you got that from, I don't know. You went on to say:

> And despite suggestions of wrongful purpose, raises no legitimate inference of racial intent. The added distance is minimal, and cannot serve to fault the change. Similarly, it is difficult, if not impossible, to criticize the use of the courthouse as a polling place—these are your words—nor does the dropoff in voter turnout raise any adverse inferences. Certainly, there's no basis to leap to the fanciful conclusions that it can reasonably be attributed to the polling place change. The burden here is on the county to demonstrate that the change is free of discriminatory purpose and effect. It has clearly met that burden and pre-clearance is required.

Even your immediate assistant who reviewed the staff recommendation came to a contrary conclusion. "The new polling place at the site where they suffered some of their most brutal treatment in their efforts to register and vote."

Now Mr. Reynolds, the Selma situation bothers me particularly, because I remember when Martin Luther King marched in Selma—I marched with him, I'm proud to say—and I remember that was the fateful day in which Viola Liusso, another civil rights protester, was in her automobile, leaving the march, and she was shot and killed in that community, and there was an FBI informant in the car from which the bullet came. He did not pull the trigger, according to my information. At least there's no evidence to that effect. What can the people of Selma think about law and order when, in the earlier instance, the Justice Department ostensibly is on their side, but the FBI informant is in the automobile when this white woman from Detroit comes down as a supporter, and now, when you, as the chief enforcment officer, head of the Civil Rights Division, make this kind of obscene decision, and over the objections of your own staff.

How does a man like you justify it? How do you explain it?

Mr. **Reynolds**. Senator, the change that was submitted to me was one that I determined had neither racial purpose nor effect, and as to the other aspect of your question, I would simply have to say that it seems to me that Selma today is much different than the Selma you describe of some 20 years ago.

There was a reenactment of that march, I believe this year, at which time many of the civil rights leaders, and the officials of Selma, demonstrated a very cooperative attitude toward the progress that had been made, and toward the advances of the community down there, and I think that we're talking about a change of a polling place today to the courthouse of Selma, which, in terms of the facts that were before me, I concluded was a legitimate and proper change that could be made by the city under section 5.

Senator **Metzenbaum**. We know of the *Louisiana* case that Senator Biden addressed himself to this morning. We know of this case. We know of your actions in going in and opening cases that nobody wants to have opened, because of your feeling that you know what the *Stotts* case stands for, even though the courts that have heard you so far on the issue have all ruled against your interpretation. I don't understand, and I have to try to figure out people like you.

You're intelligent. You appear to be a decent human being, and yet you come down in some of these cases on the side of the bigots.

Moving a polling place from the midst of a black area into the courthouse, where the people are intimidated, where it's difficult for them to get, making up fallacious arguments as to why you did it. I don't know whether you dislike blacks. You don't seem to be a bigot. You look like a decent man. I say to myself why, why does a man like this act the way he does.

I have further questions. I am told my time has expired.

Senator HATCH. Thank you, Senator Metzenbaum.

Mr. Reynolds, how many section 5 preclearance decisions are you forced to consider each year in the position as the head of the Civil Rights Division?

Mr. REYNOLDS. Senator, I believe we have in the neighborhood of 12,000 to 15,000 voting changes that are submitted to us each year.

Senator HATCH. In other words, you have 12,000 to 15,000 complaints, suggestions, requests, and so forth, that come across your desk?

Mr. REYNOLDS. Well, they don't all come across my desk. There are a number of them, as was pointed out earlier, that are fairly routine changes, and as a result, those that are precleared under that category are done by the voting section.

Senator HATCH. Well, tell us on the committee, what are your criteria for evaluating these particular preclearance motions?

Mr. REYNOLDS. Well, the standard is one that is set out in the statute, and we also have a comprehensive set of guidelines that the division has issued in order——

Senator HATCH. Did you make up those guidelines, or were they there when you got there?

Mr. REYNOLDS. No; those guidelines were there when I got there. We did revise the guidelines this year in order to spell out a little more clearly what the specific standards were, and I think that clarification has been well received. We basically have to look at each change to see whether it has a discriminatory purpose behind it, that is, whether it's motivated by racial animus, or if it is something that is discriminatory in effect. The courts have said that that means you have to look to see whether it's retrogressive or dilutive of where the black voting strength was at the time that the change was made.

Senator HATCH. So you have 12,000 to 15,000 preclearance decisions to make almost every year? Somewhere in that neighborhood?

Mr. REYNOLDS. The Division has that many changes each year.

Senator HATCH. That's a lot of decisions, isn't it?

Mr. REYNOLDS. It is an awful lot of decisions. That's correct.

Senator HATCH. Are you absolutely positive you've always made the right decision on all 12,000 to 15,000?

Mr. REYNOLDS. Well, Senator, as to the ones that have come to my desk, I feel that I have applied the best judgment I possibly could, and applied the standard in the most arduous way I can, and I feel confident that the decisions that I made are faithful to the statutory standard that I'm required to apply.

Senator HATCH. Now you were referring to the *Beard* decision just a few minutes ago, were you not?

Mr. REYNOLDS. That is the decision of the Supreme Court that——

Senator HATCH. Tell us what that decision says.

Mr. REYNOLDS. That decision, Senator, effectively says that with regard to the discriminatory effect standard in section 5, it is to be read as permitting no retrogression, backsliding, or dilution in the minority voting strength from where it was at the time the change was originally made.

Senator **Hatch**. Now, when you talk about 12,000 to 15,000 voting rights preclearance matters that you have to decide every year, you have to decide them according to set law formulas, or procedures, is that right?

Mr. **Reynolds**. That's correct.

Senator **Hatch**. In addition to that, you have Justice Department procedures that play off of set law, and formal procedures, is that correct?

Mr. **Reynolds**. We do have a procedure, or process, that we use.

Senator **Hatch**. And they existed before you got them?

Mr. **Reynolds**. They certainly did.

Senator **Hatch**. Have you tried to comply with all of them?

Mr. **Reynolds**. I have followed those procedures. In fact the internal process of review in the Justice Department has been the same for a number of years, and we've made no changes in that.

Senator **Hatch**. In these type of difficult, volatile matters, can you see where there may occasionally be people who would differ, or disagree with the decisions that are made?

Mr. **Reynolds**. Senator, there has been a considerable amount of disagreement on a number of these, but I would also point out that while there are decisions that I have made, which the staff has disagreed with, after I've received the staff's recommendations, we've had meetings on numerous occasions, and sometimes I've persuaded them that my view of the matter differs from what they stated in their memorandum, and sometimes they've persuaded me that their view is better than the one that I thought after I read their memorandum.

So, after we get the memoranda that have been discussed here by the staff, there's considerable discussion on all of these that come to my desk, and I don't always prevail in my view of these, nor does the staff always prevail on its view.

Senator **Hatch**. Now, for these 12,000 to 15,000 preclearance decisions that have to be made by your division down there at the Justice Department, do you ever really reject preclearance efforts that are made under the procedural rules and guidelines, and regulations, and Justice Department standards that are set, and that you have to abide by?

Mr. **Reynolds**. I'm not sure I understand.

Senator **Hatch**. I asked do you ever reject preclearance efforts under those criteria?

Mr. **Reynolds**. Well, we certainly do object——

Senator **Hatch**. Or applications would be a better way of saying it.

Mr. **Reynolds**. We do object to requests for preclearance, and when we do, we require the jurisdiction to come back to us, and we will reconsider any new submission responsive to our objection, and withdraw it, if it is appropriate.

Senator **Hatch**. So am I fair in assuming from your comments that it's not without precedent that you reject, sometimes, preclearance applications?

Mr. **Reynolds**. Oh, no, we have indeed. One of the strengths, as I pointed out earlier in my testimony, Senator, is that we have indeed issued a number of objections. I think we have in the redistricting area alone 110 objections that we had to redistrict because we felt they were not proper under the standard, and indeed, were disadvantageous to the minority voting strength.

And as a result of those objections, all of those jurisdictions had to do their redistricting over again in a way that was very responsive to the minority interests that were involved.

Senator HATCH. So you consider this a serious review process?

Mr. REYNOLDS. It is extremely serious. It certainly is.

Senator HATCH. Well, how many attorneys do you have working with you in that Division?

Mr. REYNOLDS. I think there are 18 attorneys, and I believe 12 or 13 paralegal staff analysts who are in that section.

Senator HATCH. Who handles these 12,000 to 15,000 applications?

Mr. REYNOLDS. Yes, and who handle these voting cases. That's correct.

Senator HATCH. Would it be safe to say that even they differ from time to time, and maybe more than that, on what the ultimate result should be on some of these particular applications?

Mr. REYNOLDS. That is absolutely the case. There is a lot of difference of opinion among the staff, before it a matter ever gets to me, as to how some of these matters should be resolved.

Senator HATCH. In other words, this isn't as simple as it's being made out to look, is it?

Mr. REYNOLDS. Well, it certainly is not simple. It's a very tough, complex decision that we're required to make under the statutory scheme, within a complex procedure. We struggle long and hard with each one of these, and we have to do it under a timeframe that the Congress has imposed on us, and it seems to me, notwithstanding those difficulties, that it's a remarkable job that the Division has been able to do to deal with all of these.

Senator HATCH. Now, you're saying that there are 12,000 to 15,000 of these preclearance problems that are serious problems, and voluminous, and take about 14 full-time lawyers, and a whole bunch of paralegal assistants, who are putting in full time each year. And in this situation, you even have differences on staff as to what the best results should be.

You're not saying that any of your people on your staff are racists, or are people who are not fighting in the best interests of civil rights, are you?

Mr. REYNOLDS. No, absolutely not.

Senator HATCH. In other words, there may be sincere disagreements even among staff members on this matter?

Mr. REYNOLDS. I think that's correct.

Senator HATCH. Are there ever any close calls in your preclearance decisions?

Mr. REYNOLDS. Oh, I think there—yes, Senator, there are a large number of close calls.

Senator HATCH. It's a tough area, isn't it?

Mr. REYNOLDS. It is very difficult.

Senator HATCH. And no matter which way you do it, one side or the other is generally upset about it, is that right?

Mr. REYNOLDS. I think it's fair to say that no matter which way the decision goes under section 5, I am certain to have criticism from one quarter or the other.

Senator HATCH. And you've had it from one quarter or the other throughout your tenure and career as the head of the Civil Rights Division, is that correct?

Mr. REYNOLDS. And sometimes from both at the same time, Senator.

Senator HATCH. And I might add that there have been many conservatives who have been critical of some of your decisions with regard to redistricting, is that right?

Mr. REYNOLDS. That's correct.

Senator HATCH. There have been many liberals who have been critical of some of your decisions as well, is that correct?

Mr. REYNOLDS. That is also correct.

Senator HATCH. There are various political points of view. How do you approach that? How do you handle differing political points of view on these very difficult 12,000 15,000 decisions that have to be made every year? And this is only one aspect of your Civil Rights Division, isn't it?

Mr. REYNOLDS. It is only one aspect, and I think the way you handle it is to put politics totally aside with regard to this area. I put it aside with regard to any of the areas, and we do not allow political considerations to influence us one way or the other. We deal with the legal standard and the questions based on the facts submitted by the jurisdiction.

Senator HATCH. Well now, is it your responsibility to fully substitute your policy judgment de novo, or new, for that of the particular preclearing jurisdiction?

Mr. REYNOLDS. No, Senator, that's not what the statute calls for or permits. Our job is simply to receive the change and make the judgment as to whether it's discriminatory in purpose or effect, whether we might consider the change to have been better devised or better developed is not a reason for us to object or a reason to have any influence on the decision we make, one way or the other.

Senator HATCH. I see. So what you're saying here is, that this is a difficult area, and it's only one area within your jurisdiction; 12,000 to 15,000 decisions have to be made a year. You try to call them as you see it. You try to keep politics out of it.

You try to abide by the statutory law which is definitive with regard to the procedures and where it is not definitive by the regulatory law and the administrative recommendations and guidelines, and standards set by the Department. Is that right?

Mr. REYNOLDS. That's correct, Senator.

Senator HATCH. And even in doing all of that, you still have differences on your staff, because not everybody marches in unison on these very difficult issues. Is that correct?

Mr. REYNOLDS. That's correct. I've encouraged my staff not to march in unison on these issues, but candidly to bring to me their views on all of them. We discuss them openly, and sometimes rather heatedly.

Senator HATCH. So it's not unusual to have staff people differ with you from time to time on what you think is right and what they think is right?

Mr. REYNOLDS. That's not at all unusual.

Senator HATCH. And it's not unforeseen that you're going to differ with certain staff members from time to time because you have to make the decisions, is that right?

Mr. REYNOLDS. I think that is right. I ought to say, though, Senator, that in connection with a document request by this committee to prepare for my hearings, we were able to find, out of the—I think it's 50,000 plus changes—we were able to find thirty different instances where there had been a disagreement by the staff and myself on these matters.

So, I don't want to leave the impression that it is a constant battle with the staff on the decisions that we make in this area. For the most part we are——

Senator HATCH. Oh, but there are legitimate differences that arise, that you debate and try and resolve within your Department, is that right?

Mr. REYNOLDS. That's correct.

Senator HATCH. And sometimes you resolve them in a way that you feel is best, but which might not fully please one or more of your staffpeople, is that correct?

Mr. REYNOLDS. That's correct, Senator.

Senator HATCH. And I imagine your staff ranges, at least the career staff people, from a political standpoint, rather widely in political beliefs; doesn't it?

Mr. REYNOLDS. I'm not——

Senator HATCH. You don't know?

Mr. REYNOLDS. I'm not sure on that.

Senator HATCH. OK. What percentage of your total work as head of the Civil Rights Division would be taken up in handling these 12,000 to 15,000 preclearance decisions, any one of which I might differ with you on?

Mr. REYNOLDS. Well, as far as the Division's activity, I think it would probably represent somewhere in the neighborhood of approximately one-eighth of the activities in the Division.

Senator HATCH. So you're saying that in 12,000 to 15,000 preclearance decisions, some of which I assume are just perfunctory, others of which require a lot of effort, constitute about one-eighth of the total workload that you have to do as head of this particular Division?

Mr. REYNOLDS. That's about one-eighth of the workload of the Division. That's correct.

Senator HATCH. Well, I presume that any Senator, or any person, for that matter, can pick out a thousand of those 12,000 to 15,000 decisions, that they might differ with you on, or any staff member. Maybe it's only 100. Maybe it's 10. But that doesn't necessarily mean that you haven't abided by those guidelines or those principles, or those standards that have been set by the Justice Department and done exactly what you've said you've done here, and that is, put politics aside and try to decide the things on their merits. Is that right?

Mr. REYNOLDS. That's been the approach that I've taken in every one of them. That's correct, Senator.

Senator **Hatch**. OK. Now the buck stops with you. In other words, where it's a particularly difficult decision, you have to make it, is that right?

Mr. **Reynolds**. That's correct.

Senator **Hatch**. And sometimes that pleases everybody on your staff, and sometimes there are some who aren't so pleased, is that right?

Mr. **Reynolds**. Yes.

Senator **Hatch**. But they've been heard, generally, haven't they, on the tough issues?

Mr. **Reynolds**. They have all been heard.

Senator **Hatch**. You listen to both sides?

Mr. **Reynolds**. I certainly do, and if they want to be re-heard, I also insist that that take place.

Sen. **Hatch**. It may even be possible that some of the decisions you make could have been better made, is that right? You're a fallible human being.

Mr. **Reynolds**. I'm sure there are many who would agree with that.

Senator **Hatch**. I know that feeling myself. Well, let me just state, that to call this agreement with an individual decision, quote, "obscene", unquote, you know, I really think is a little bit beyond the pale here, and I wonder if maybe we here on the committee don't play a little politics sometimes rather than really examine these issues in the light of day, in fairness, without politics, and with sincerity. And I think anybody could raise any one of these decisions that you've made and say "I disagree with you on that decision."

But I think to take the attitude that has been taken here basically reflects a total misunderstanding of the functions here, and that's why I've tried to go through this with you so that people will understand this is a tough area, that it is difficult, and if you played politics with it, you'd be strung out to dry in the worst possible way, it seems to me. Well, my time is up. We'll turn to Senator Simon.

Senator **Simon**. Thank you, Mr. Chairman. Mr. Reynolds, one of the problems is the image that your leadership has projected on the whole issue of civil rights, and it's perhaps summarized best in the words of an article which you wrote, which is titled: "The Civil Rights Establishment Is All Wrong", which appeared in a magazine called "Human Rights" in the spring of 1984.

William Coleman, who was Secretary of Transportation under Gerald Ford, said of your tenure at the Justice Department, according to the New York Times of July 9 of last year:

> The policies of Mr. Reynolds with regard to civil rights have been just about a hundred percent wrong and despicable. I don't think his positions are consistent with the law, the Republican Party philosophy, or with the long-range interests of the country. It would be good if Mr. Reynolds was replaced.

I was just handed by my staff a letter that was signed and I'd like to insert it in the record, Mr. Chairman.

Senator **Hatch**. Without objection, we'll put it in the record.

[The letter follows:]

Congress of the United States
House of Representatives
Washington, D.C. 20515

June 3, 1985

Honorable Strom Thurmond
Chairman
Senate Judiciary Committee
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

We are writing regarding the nomination of William Bradford Reynolds to serve as Deputy Attorney General of the United States. We have serious reservations with his nomination to this important position.

By approving his nomination, the Senate would, in our view, be condoning a record which demonstrates total disregard for the legislative and judicial branches of government. For the past four years, as Assistant Attorney General for Civil Rights, Mr. Reynolds has tenaciously refused to enforce civil rights laws with which he personally disagreed, and has zealously sought to cripple or nullify those laws in the courts.

He has succeeded in this latter effort in the Grove City case, which severely limited the Title IX prohibition against sex discrimination. When Congress attempted to overturn Grove City to restore the scope of coverage to the major civil rights laws, he was a leader of the opposition. Mr. Reynolds has sought to eliminate employment affirmative action programs, based on an overbroad and legally questionable interpretation of the Stotts case. He has repeatedly approved transparently discriminatory election laws, forcing minority voters to go to court to vindicate rights the Justice Department is supposed to protect. The Civil Rights Division refuses to use all available remedies to eliminate school segregation, and allows defendants to be discharged of their obligations even if their schools remain segregated. Mr. Reynolds was also the principal architect of the Administration's ill-considered policy of giving tax exemptions to discriminatory private schools like Bob Jones University.

When Executive Department officials have concluded that federal civil rights laws were being violated, Mr. Reynolds has refused to permit enforcement litigation, or to take any action on a request for such enforcement. This policy of calculated inaction and indifference has consistently frustrated legal steps necessary to end discrimination on the basis of race, national origin, sex and disability.

This pattern of conduct, and Mr. Reynolds' testimony before Committees of the House, leave no doubt that he is unwilling to enforce statutes, regulations and judicial decisions which are inconsistent with his own social or political theories, despite his oath of office to uphold the law. Even in cases involving laws he purports to support, such as statutory and constitutional prohibitions against intentional discrimination, Mr. Reynolds professes an inability to see instances of bias against minorities or women which are patently obvious to federal judges who review the circumstances involved. All too often Mr. Reynolds' decisions have been made under circumstances which suggest that they were dictated by a desire to respond to the exercise of political influence and not by a balanced review of the evidence.

This is not a record that the Senate should approve or encourage by elevating Mr. Reynolds to higher office. None of us, of course, agrees with the substance of every federal statute, regulation or judicial decision, but we all recognize the clear danger to the rule of law that would be posed by the continued presence in the Department of Justice of a top official who seems unable or unwilling to understand that final responsibility for making and interpreting the law lie with the Congress and the Judiciary, respectively, not with officials of the Executive Branch.

The contrary view should not have been tolerated in the Civil Rights Division during the past four years, and should not now be sanctioned by the Senate as the policy for administering all divisions which are subject to the supervision of the Deputy Attorney General. We urge the Senate Judiciary Committee to disapprove the nomination of Mr. Reynolds for Deputy Attorney General.

Thank you for considering our views.

Sincerely,

Augustus F. Hawkins
Augustus F. Hawkins
Chairman
Committee on Education
and Labor

Don Edwards
Don Edwards
Chairman
Judiciary Subcommittee on
Civil and Constitutional Rights

Pat Schroeder
Patricia Schroeder
Co-chair
Congressional Caucus for
Womens' Issues

John Conyers
John Conyers, Jr.
Chairman
Judiciary Subcommittee on
Criminal Justice

Mickey Leland
Mickey Leland
Chairman
Congressional Black Caucus

Bill Richardson
Bill Richardson
Chairman
Congressional Hispanic Caucus

Barney Frank
Barney Frank
Chairman
Government Operations
Subcommittee on Employment
and Housing

Matthew G. Martinez
Matthew G. Martinez
Chairman
Education and Labor
Subcommittee on
Employment Opportunities

cc: Honorable Charles Mc. Mathias, Jr.
Honorable Paul Laxalt
Honorable Orrin G. Hatch
Honorable Alan K. Simpson
Honorable John P. East
Honorable Charles E. Grassley
Honorable Jeremiah Denton
Honorable Arlen Specter
Honorable Mitch McConnell
Honorable Joseph R. Biden
Honorable Edward M. Kennedy
Honorable Robert C. Byrd
Honorable Howard M. Metzenbaum
Honorable Dennis DeConcini
Honorable Patrick J. Leahy
Honorable Howell Heflin
Honorable Paul Simon

Senator SIMON. It is by eight Members of the House, Chairs of various committees and subcommittees, including the chairman of the Congressional Black Caucus, and the chairman of the Congressional Hispanic Caucus, urging that we reject your nomination.

One of the questions is, to what extent are the positions that you have taken really your leadership, and to what extent do they simply reflect, the orders of somebody on Pennsylvania Avenue, or somewhere else.

This morning's Washington Post has an editorial which, among other things, says:

> Mr. Reynolds, as head of the Civil Rights Division, the administration's leading civil rights official, has moved systematically to narrow the remedies available to blacks and other groups historically discriminated against in our society.

They say you have bent the law rather than enforcing it, and they also say:

> But neither does it seem to us that Mr. Reynolds can be described as a mere foot soldier in the campaign of the last 4 years. He has been a leader, a tireless adherent. He has been a step ahead of courts and colleagues as well in trying to reverse or close down programs that were seeking to give black Americans a break.

Do you care to comment on this whole question of whether you have simply been following policy, or whether you have created policy?

Mr. REYNOLDS. Senator, the policy of this administration in the civil rights area is one that was set, I think very firmly, by the president at the beginning of his first term, and by Attorney General Smith when he came into office, and probably was outlined, in the first instance, in a speech given by Attorney General Smith back in May of 1981 before I was confirmed to be the Assistant Attorney General for civil rights.

I subscribe to the policies of the administration and I have certainly followed those policies, and in doing so, I have made every effort that I possibly could, to do so within the letter and the spirit of the laws that are on the books, and that I am charged with enforcing.

Senator SIMON. But if we could take a specific case, *Grove City*, if you want, or let's just say the Indianapolis case, where you have intervened, where the Justice Department worked out an agreement on affirmative action, and all of a sudden, we find the Justice Department, the very same Justice Department moving in, and trying to disrupt existing programs.

You have a conservative Republican mayor of Indianapolis, very much concerned about what you're doing in his community.

Did you do that on your own? Are you following orders? What made you determine you had to go into Indianapolis to try and, from their viewpoint, from my perspective on the basis of limited knowledge, to disrupt the situation there.

Mr. REYNOLDS. Well, Senator, our intention was not to disrupt unduly any situation after the Supreme Court's decision in the *Memphis Firefighters* case, which we understood to limit the authority, or maybe I should more accurately say, confirm Congress' intention, that the authority of the courts is limited under title VII to make whole relief, and outreach programs and recruitment. After that came down, we had to, we felt, review our existing consent decrees that had been put in place prior to that decision to insure that they conform with that decision. We are parties to those decrees.

We undertook that, and with regard to the ones that we felt had quota provisions that were declared by the Supreme Court decision to be impermissible, we went back to those jurisdictions, and we sought to enter into an agreement with them to modify those decrees for the future, to substitute the quota provision with an affirmative action recruitment and outreach program that would enhance bringing greater numbers of minorities and women into the police department or fire department of those jurisdictions.

And it was on that basis that we went back to the city of Indianapolis when the city——

Senator SIMON. But I'm not getting my question answered. You say we had to, we felt, go back in. What I want to know is, does that mean I had to, I felt? Does that mean that you have received an order from the Attorney General, from the White House? Who makes this decision?

Mr. REYNOLDS. Well, these decisions, I think in this context, are ultimately made by the Attorney General of the United States. I had consultations with the Attorney General and it was as a result of those consultations, and the review of the opinion in the Supreme Court, that the decision was made by the Justice Department to review our consent decrees and to take the course of action that I've outlined.

Senator BIDEN. Would the Senator yield for a second.

Senator SIMON. I would be pleased to yield.

Senator BIDEN. When the case came down, did you pick up the phone and call the Attorney General, or did he pick up the phone and call you, to say "We should review these cases"?

Mr. REYNOLDS. Neither one of us picked up the phone, Senator, to call the other. What did happen is, as a general matter we have staff meetings with the Attorney General on a regular basis during the week.

One of the topics that came up in those staff meetings was the Supreme Court's decision, its impact, and what should be the proper response as a result of that decision. It was in the course of those discussions that we took the course of action that we did.

Senator SIMON. Somebody had to make a decision. What I'm trying to get at is, was that your decision? Did you recommend this to the Attorney General? You took a very, very narrow view, from my perspective of the *Stotts* case, and made a universal application of it. Now was that your decision? Or was that the Attorney General's decision?

Did you recommend to the Attorney General that you do this, or did he recommend it to you?

One of the two of you had to make a recommendation.

Mr. REYNOLDS. I recommended to the Attorney General that, based on my reading of the Supreme Court decision, we should review our consent decrees to insure that they do not contain provisions that the Supreme Court has indicated would be impermissible.

Senator SIMON. Alright. I think there you have answered the question. I asked my staff to review the record. Let me just read a couple of sentences, and I'd be interested in your comment.

> Mr. Reynolds' view of Supreme Court precedents is extraordinarily selective. Where a decision upholds an affirmative action plan, such as the *Weber* case, permitting a private employer to adopt a voluntary affirmative action plan, or the *Fuller-Love* case, upholding the minority set aside provision for government contracts, Mr. Reynolds has construed these holdings to be narrowly limited to their facts. By contrast, he has viewed Supreme Court decisions striking down affirmative action plans in their broadest possible contexts.

I have to say, in reviewing the various cases that have been handled by your Division, it's very difficult to come to any conclusion other than the one that my staff has come to. Would you care to comment.

Mr. REYNOLDS. Well, Senator, with regard to the *Weber* and *Fullilove* cases, *Weber* pertains to private employment which is not an area that is within the responsibility of the Justice Department, so I have really not had occasion, as far as implementing or making employment decisions under the statute, to use the *Weber* decision to any great degree.

But I would say, as a general matter in response to that, that what I try to do is read Supreme Court decisions faithfully and to construe them and interpret them in the way that the language of the majority opinions suggests they should be interpreted.

My own sense is that I don't think that my reading of the *Memphis Firefighters* case is inordinately broad, nor do I think that my reading of the *Weber* case is inordinately narrow.

Senator SIMON. Well, I have to say, I am compelled to reach a different conclusion.

Finally, on the *Grove City* case, I note that the chairman of the Civil Rights Commission, who is not known for taking strong stands in the field of civil rights, wrote a letter to you on the *Grove City* case. He stated:

> We believe the Department's view represents a sharp reversal of longstanding Federal policy which, if pursued, will reduce civil rights protections and education significantly.
>
> Your letter implies a strong break with the civil rights policy pursued by every administration since non-discrimination requirements for federally-assisted programs were enacted.

Now, when you receive a letter like that, do you weigh it at all?

Mr. REYNOLDS. I don't recall that letter, Senator. When was that written to me and what was the subject of the letter?

Senator SIMON. I have to say I don't have the date of it here, right now.

Senator HATCH. Do you have the actual letter, Senator?

Senator SIMON. I do not. I have excerpts from the letter, but we will provide both the date and the full letter for——

Senator HATCH. As long as it is not violative, we will place the letter from the Attorney General's office dated May 28, 1985, pertaining to confidential matters in the record at this point.

[The letter follows:]

U.S. Department of Justice

Office of Legislative and Intergovernmental Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

May 28, 1985

Honorable Strom Thurmond
United States Senate
218 Russell Senate Office Building
Washington, D.C. 20510

Dear Mr. Chairman:

On May 23 we received from the Senate Judiciary Committee an extensive document request in connection with Wm. Bradford Reynolds' confirmation hearing. Due to the nature of the request, we were unable, despite a concerted effort on the part of Civil Rights Division lawyers and paralegals, to locate and make available the many documents that were called for by close of business Friday, May 24. By working through the Memorial Day weekend, we have been able to collect most of the requested materials for the Committee's inspection. Since a few documents sought have yet to be found, we are continuing our search and will, of course, make additional requested items available as they are located.

You will note that but a small portion of the produced documents accompany this letter. The sheer volume of documents requested makes copying all of the documents impossible. Further, some of the documents pertain to pending litigation and must be readily accessible to Division attorneys. In addition, these documents include a number of (1) internal, deliberative legal memoranda normally protected from disclosure under the attorney work-product privilege, and (2) information and documents received from outside parties involved in ongoing court matters that relate to sensitive negotiations and are under a promise of confidentiality.

As a consequence, we have collected the materials in the conference room of the Civil Rights Division of the Justice Department (Room 5644) so that designated members of the Committee's staff can inspect them here at the Department during normal business hours, starting this afternoon. In this way, we believe that the Committee's interest in examining the requested documents can be fully accommodated without at the same time compromising the integrity of the Division's ongoing litigation activity. */ While we are making these documents available to the Committee solely for its official use in connection with Mr. Reynolds' confirmation, our production of them does not constitute a waiver of any applicable privileges.

There are a number of cases pending in court where parties making many of the same broad-based requests have been denied access to Division attorneys' work product and to most of the other confidential materials, and we feel it is important that our readiness to cooperate with the Committee not serve as an indirect discovery vehicle in any of these matters. Accordingly, we would request that Committee staff assigned to review the documents be directed not to disclose to anyone other than members of the Committee (and their immediate staff assigned to assist in the confirmation hearing) the contents or existence of any memoranda within the category of privileged attorney work product, or any documents otherwise subject to an outside claim of confidentiality. In order to ensure no breach of confidence, I would also ask that those within the select group entitled to discuss these matters with the staff reviewers also agree not to discuss confidential documents or internal deliberative legal memoranda with others outside the protected circle.

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*/ A small number of the requested documents concern pending litigation wherein the court has ordered that the documents not be disclosed. These documents are not being made available for inspection.

For the reasons stated, we must ask that any copying of "protected" material (as described above) be kept to an absolute minimum -- based on Division agreement on a document-by-document basis -- and that any such copies be shared only with Committee members on a confidential basis.

With these understandings, the response to each separate request is set forth below:

I. (1) These materials have been collected and are available for inspection in Room 5644 of the Justice Department, with the exception of documents in the case files for State Hospital of Southern Idaho, Blackfoot, Idaho, and the case files for Gates v. Collier, all of which are currently in the Federal Records Center. We have requested that these files be returned to us, and we will make them available for inspection when we receive them.

(2) These materials have been collected and are available for inspection in Room 5644 of the Justice Department.

(3) These materials have been collected and are available for inspection in Room 5644 of the Justice Department.

(4) With respect to subparagraphs (a) and (b), the attached list contains the information requested in both subparagraphs. With respect to subparagraph (c), these materials have been collected and are available for inspection in Room 5644 of the Justice Department.

(5) These materials have been collected and are available for inspection in Room 5644 of the Justice Department.

(6) With respect to subparagraphs (a) and (b), the requested lists are attached. The additional materials requested have been collected and are available for inspection in Room 5644 of the Justice Department. Some of the materials available for inspection in response to request I. (3) are responsive to this request.

(7) These materials have been collected and are available for inspection in Room 5644 of the Justice Department.

(8) These materials have been collected and are available for inspection in Room 5644 of the Justice Department.

(9) These lists are attached hereto and contain the number of specific beneficiaries in each Title VII decree as well as the number of units in each housing case subject to a Title VIII decree. We are seeking to compile the names of the individuals in each of the cases.

(10) These materials have been collected and are available for inspection in Room 5644 of the Justice Department.

(11) These materials have been collected and are available for inspection in Room 5644 of the Justice Department.

(12) The transcript of Mr. Reynolds' oral argument in Bob Jones University v. United States is available for inspection in Room 5644 of the Justice Department. We do not have

a transcript of oral argument in *Riddick* v. *School Board of Norfolk*, and Mr. Reynolds did not argue the cause for the United States in *Williams* v. *New Orleans*.

II. (1) The requested information is attached except for information responding to subparagraph (e), which we must reconstruct from memory because our files are not indexed to reflect the information. When we have completed this task, we will supply a list of these matters, to the best of our recollection. The materials requested have been collected and are available for inspection in Room 5644 of the Justice Department.

(2) The Civil Rights Division has no written guidelines for filing lawsuits under Section 2 of the Voting Rights Act. The Division guidelines for Section 5 review of voting changes, as recently revised, has been published in the Federal Register for public comment and can be found at 50 Fed. Reg. 19122 (May 6, 1985).

(3) We are seeking to approximate the litigation cost to the Department of Justice associated with *United States* v. *City of Buffalo* and *United States* v. *Jefferson County*.

(4) These materials have been collected and are available for inspection in Room 5644 of the Justice Department.

(5) These materials have been collected and are available for inspection in Room 5644 of the Justice Department.

(6) These materials have been collected and are available for inspection in Room 5644 of the Justice Department.

(7) These materials have been collected and are available for inspection in Room 5644 of the Justice Department.

(8) These materials have been collected and are available for inspection in Room 5644 of the Justice Department.

(9) These materials have been collected and are available for inspection in Room 5644 of the Justice Department.

Sincerely,

Philip D. Brady by J. C. P.

Philip D. Brady
Acting Assistant Attorney General
For Legislative and Intergovernmental
Affairs

Attachments

Mr. **Reynolds**. Senator, does that have reference to the position we took in the *Grove City* litigation?

Senator **Simon**. That is correct.

Mr. **Reynolds**. Well, I think that there were a number of people that did indeed feel that way, and my only answer is that the Supreme Court did agree with our interpretation of the statute as we argued it to the Court. I have said earlier that there are many who have criticized me for being too broad in my interpretation of that statute, and others who have criticized me for being too narrow.

A majority of the Supreme Court felt that we had indeed made the argument that was precisely what Congress intended when it enacted title IX in 1972.

Senator **Simon**. Again, just a final comment, Mr. Chairman. I don't think there's any question about your ability or integrity.

I think, in response to my questions, it's fairly clear you have been a leader, and leaders that lead in the right direction are to be commended.

Leaders who do not lead in the right direction, I don't think should be promoted, and that's the reluctant conclusion I have reached here, Mr. Chairman. Thank you.

Senator **Hatch**. Sometimes the right direction is a matter of interpretation, which we have a lot of difficulties with around here. I'll reserve my 15 minutes and turn to the ranking minority member.

Senator **Biden**. Thank you. I'd like to go back and pick up where I left off on the *Treen* case, if I may, and I apologize for how disconsertive this becomes. We all have a different line of questioning and with the 15 minute limitation, it's hard to keep some continuity here.

But the last question I asked you related to the allegation made by one individual who had requested confidentiality, that one of the legislators who was very influential in defeating the majority black district plan had told him, and I quote: "We already have a nigger mayor and we don't need another nigger bigshot", and I asked you whether or not you recalled this allegation, or any similar allegation coming to your attention when this matter came before you in discussions with staff, and I believe your answer was yes, you do recall that?

Mr. **Reynolds**. I recall that in the memoranda that were provided, there was some reference to allegations of that nature.

Senator **Biden**. Now, can you tell the committee what if anything you did to investigate this allegation, or whether or not you thought it warranted investigation.

Mr. **Reynolds**. Senator, the Treen matter was one that occupied a considerable amount of time and attention of the Division. It called into being a number of meetings that we had with the individuals who were opposed to the redistricting, with the Governor of Louisiana and a number of people on his official staff, and those who were supporting the redistricting.

In terms of those particular allegations—and I'm not sure, when I say that, exactly which ones you really have reference to but——

Senator **Biden**. Let me be real clear. I'm trying to be as precise as I can. The allegation that a key legislator said, and I quote:

"That we already have a nigger mayor and we don't need another nigger bigshot." End of quote.

That is the specific reference that I'd like to know whether or not you followed up to determine whether that in fact was said, and whether or not that in fact would give you any insight into how the decision was made.

Mr. REYNOLDS. Senator, I don't have a specific recollection with regard to that particular statement. I do have a recollection that both my staff and I reached the very firm conclusion that with regard to this particular redistricting, if it was indeed something that was motivated by racial purpose, depended on Governor Treen's attitudes, as he had a part in this redistricting.

And we all came to the conclusion during the process of this review that it was indeed the Governor's attitude and his mindset that would make the determination as to whether or not there was racial purpose. Now, there were other comments made at different points in time in the redistricting process by different individuals, and I can't recall precisely how those were responded to, and who investigated them, and what follow-up there was.

But I do recall very distinctly, that when we had done all of that probing and reviewing, it really was the view of my staff and myself, that we had to make it clear that the Governor did not have a racial motive with regard to his participation in this redistricting, in order to pre-clear it, and that if it was indeed a matter where we could ascribe racial motive or racial animus to him, then we could not pre-clear it.

Senator BIDEN. So, in other words, notwithstanding the fact that the State legislature may have had a motive that was racially motivated, as long as that wasn't the motive of the Governor, it is irrelevant?

Let's assume, for the sake of discussion, that those state legislators who all met in the basement, when the Governor made it clear he would veto the first plan, assuming they said—you know, if someone stood up and said, "Well, you know, we've got one nigger bastard who is now the mayor and we don't need any more of them", and they all said that's right, right on, we don't want any parts of that. Therefore, we're not going to go with this plan. Assume that had happened. The fact that the Governor didn't share that view would not have affected your preclearance?

Mr. REYNOLDS. No, I don't believe I said that, Senator. We would have objected to the plan.

What I said was, that we probed the minds of the legislature, and everybody came to the conclusion, on my staff, that there was not racial animus that we could ascribe to the legislature.

Senator BIDEN. Oh, to the legislature. OK.

Mr. REYNOLDS. That's correct. And so the question that we really were left with, was whether the Governor's influence over the legislative body, in the redistricting process, was one that was exercised by reason of racial motive on the part of the Governor, and if indeed that was the case, then I was prepared to object.

But I think that it is accurate to state, that it was the view of all of us on reviewing this, and reviewing it very, very extensively and probingly, that we were not looking at a situation where racial purpose would have been ascribed to the legislative bodies.

Senator **Biden**. OK. I would like to go through some of the allegations and findings discussed by the Court and ask you if you were aware of them at the time you precleared the plan, and if you were, why you didn't believe they constituted sufficient evidence to in fact not preclear. On pages 333 and 334 of the opinion, the Court discussed Governor Treen's role as follows:

> Because of his decisive role in the defeat of the first plan which would have created a black majority district after it had received the overwhelming support of both houses of the legislature, Governor Treen's stated reasons for acting are relevant.
>
> The Court notes that the Governor wanted to maintain existing district configurations where possible, protect the Republican incumbent in the U. S. Congress, Mr. Livingston, and retain New Orleans traditional influence in the selection of two U. S. Representatives.

But the court also found that Governor Treen:

> Specifically rejected the Nunez plan which would create a 55 percent black district because of his opposition to any scheme which intentionally drew boundary lines so as to consolidate a majority of one race within a single district.

The Court concluded that:

> The Governor's opposition to the Nunez plan was predicated in significant part on its delineation of a majority black district centered in Orleans Parish.

First of all, do you agree with the Court's conclusion as to the Governor's motivation?

Mr. **Reynolds**. I lost where you were reading from here.

Senator **Biden**. I'll go over it again.

Mr. **Reynolds**. Where is the last—I don't——

Senator **Biden**. Pages 333 and 334 of the Court's opinion.

Mr. **Reynolds**. Right. Where on 334 were you reading?

Senator **Biden**. The bottom of page 333 and the top of 334.

Mr. **Reynolds**. All right. I think that was indeed the Governor's concern about the redistricting, the Nunez plan.

Senator **Biden**. So you concluded that the Court's interpretation of the Governor's motivation was correct? That is, specifically reject the Nunez plan which would create a 55-percent black district because, quote: "It intentionally drew boundary lines so as to consolidate a majority of one race within a single district."

Mr. **Reynolds**. The Governor's concern was that the Nunez plan, which was not the one that was before us, but that the Nunez plan had been drawn in a way that took race into account to, in essence, make it a majority black district, and his view was that the black community would be better served by having two influence districts, 40 percent or better, rather than having all of the black population packed into a single district.

And what he was concerned about, and I think that's what the Court is saying and I would agree with that, is that as to the Nunez plan it was drawn in a way that was designed really to either have a maximized black district or to put all of the blacks in one district rather than draw it so they would have two influence districts.

Senator **Biden**. Did you agree with the Governor's argument?

Mr. **Reynolds**. Well, it wasn't for me to agree or disagree with his argument as to whether it's better for the community to have one majority district or two influence districts. We really stay away from those kinds of judgments in these section 5 matters.

My only interest was in ascertaining whether the Governor was doing it for racial or nonracial reasons.

Senator **BIDEN**. On another issue, the Court, on page 333, says, that one reason some legislators opposed the Nunez black majority plan was because of:

> Antagonism of a number of legislators toward the drawing of a district whose racial composition would facilitate the election of a black Congressman.

For example, the Court quotes a local representative who testified at the section 2 proceeding.

> There were people that supported the plan—the Nunez plan—like myself, because we wanted to be aggressive in pushing for a black district, or a district where minority voting strength would be encouraged, and so there were people on the opposite side who didn't feel that they wanted to have a district that would be able to elect a black representative.

At the time you precleared, were you aware that allegations had been made that antagonism toward the district was based on the fact that they could elect a black Congressman?

Mr. **REYNOLDS**. I was, and I was also aware that the legislature had approved the Nunez plan, and that that antagonism was not certainly what was the prevalent view of the legislature, but rather the legislature, by a majority, had certainly voted down that view.

Senator **BIDEN**. So, did you do any investigation beyond just looking at the vote? In other words, the fact that a majority of legislators voted for the Nunez plan was, for you, on its face, evidence of the fact that those who had an antagonism toward the prospect of a black district electing a black Congressperson had been overcome?

Mr. **REYNOLDS**. Well, now, as I said earlier, Senator, we did an extensive investigation of all the matters in this, and I wouldn't say that it was simply by reason of the vote, but I would say that the vote certainly was one that reflected the fact that the legislature as a whole was not of the same mind as those that you have mentioned who were antagonistic and indeed had voted down that prospect, and it didn't seem to me, based on that vote and other investigation of this, that there was reason to ascribe racial purpose to the legislature.

Senator **BIDEN**. Soon after Governor Treen stated his intention to veto this majority black district plan, or the Nunez plan, the Senate president summoned, quote, "interested parties" to a private meeting in the Senate computer room, in the subbasement of the State capital. From this meeting emerged the plan that was ultimately enacted and sent to Justice.

According to the Court on page 334:

> Those responsible for calling the gathering decided that the goal of crafting a district with a high minority profile would have to be abandoned. The participants determined that the minority's interest in obtaining a predominantly black district would have to be sacrificed in order to satisfy both the Governor and the Jefferson Parish group.

One participant at that meeting testified to the court:

> The feeling in the meeting was that the one group, the one constituency group that was not going to come out of this session satisfied was going to be the blacks. They didn't have enough votes.

Most importantly, in my view, the Court found that black legislators were not invited to attend this meeting, and that:

> Because all were aware that the conflicting objectives of the Governor and the black legislature with respect to the black majority district could not be harmonized, the latter were deliberately excluded from the final decisionmaking process.

Mr. Reynolds, were you aware of any of the allegations of discrimination along the lines of what I have just read you, at the time you precleared, that is, that the black legislators were excluded from discussions in the final decision here?

Mr. REYNOLDS. I was, Senator. What happened, to try to put it together, is that the legislators decided, when they did the final drawing of the plan, that both of those who were on either side of the arguments for a particular districting would not be included in the room, and therefore, the Governor and his officials, who had indeed been party to most of the redistricting discussions, at that time were excluded, as were the black legislators, and the effort was made in that room, as I understand it, to come up with a kind of a legislative package that would indeed be responsive to the very antidiscrimination concerns that were on the record and not be ones that were put together in the room with the antagonists and the protagonists going at it yet again in the redistricting process.

Senator BIDEN. So the fact that blacks were excluded from the meeting did not in any way concern you in light of the fact that the Governor's people were also excluded?

Mr. REYNOLDS. Well, it concerned me, Senator, in the same way as I've indicated in the other answers to you. We certainly probed that situation along with the others, and my staff and I came to the conclusion that, as far as legislative purpose or animus was concerned, we did not feel that there was anything that had been demonstrated to us, that would suggest that the legislature had acted with a racial purpose.

Senator BIDEN. Had the Governor's people not been excluded, would you have reached the same conclusion?

Mr. REYNOLDS. Senator, I can't really speculate as to what would have happened in the Louisiana redistricting if we start taking out certain ingredients and putting in other ingredients, on a hypothetical basis, to try to reassess that complex matter that was before me.

Senator BIDEN. Fair enough. I'll come back on my next round.

Senator HATCH. Thank you, Senator Biden. Senator Grassley.

Senator GRASSLEY. Thank you, Mr. Chairman, and again, Mr. Reynolds, I welcome you here, and again reiterate my feeling that you can contribute much to the Department of Justice, and thank you for serving the people of the United States.

And as I indicated in my statement this morning, I would have some questions along the line of defense and information seeking. And as we discussed in our office, maybe a couple of weeks ago now, I brought up the issue of defense fraud prosecutions, and whether or not the Department of Defense was doing enough in that area, and as I know as a fact, and as you stated, you know, you aren't directly related with that.

But on the other hand, you're No. 3 in position within the Department, and so I assume that you will be at least somewhat, have some input into that area of defense fraud prosecution. Would that be correct?

Mr. **Reynolds**. I think that certainly some of that comes under the Civil Division's responsibility as well as the Criminal's, and also I suspect that there will be some discussions with the Deputy Attorney General and the Attorney General in that area.

Senator **Grassley**. OK. And you would be trying to make some input into that area as well?

Mr. **Reynolds**. Well, certainly to the extent that the Attorney General asks for my views and assistance, then I would certainly do it, provide it.

Senator **Grassley**. I can appreciate that. Now recently, the Department's Economic Crime Council reported that the low number of defense fraud prosecutions is a result of what they refer to as an alarmingly low number of cases referred by the Department of Defense inspector general. Now, that Department of Defense Inspector General, on the other hand, claims that he is referring hundreds of cases to Justice, and that his office is experiencing difficulty in persuading Justice's prosecutors to take action, and I have been provided a list of 263 cases, that the IG in DOD did refer to the Justice Department.

The latest word is that the Justice's Crime Council Report is being revised on this issue of case referrals, yet last week, Department officials said they stand by that report, and its conclusion that DOD is not sending the Justice Department enough cases.

Now obviously this tossing the ball back and forth confuses me, and anybody else that would pay attention to it, just a little bit, by all the fingerpointing between the agencies and the reports and conclusions being revised.

I would like to know, first, whether you believe the report of an alarmingly low number of cases coming from DOD is accurate, and if so, what DOJ is doing, or will do to correct this problem?

Mr. **Reynolds**. Well, Senator, I do not have any personal knowledge as to those matters, which have really been outside the area of my responsibility, but if confirmed, I would certainly urge the Attorney General to look into that matter carefully, and to make sure that the agencies clear up whatever discrepancies there are, and make a report that's forthcoming, which does indeed address those discrepancies.

Senator **Grassley**. OK. I thank you. Also, we talked a little bit about Justice's cooperation with Congress, and more particularly with this committee, when you were in my office.

As you know I have had some difficulty receiving information I have requested, and in many cases, I have not received information in any kind of timely manner.

Now, while I understand that the Justice Department has problems like any bureaucratic institution with letters and papers that are sometimes misplaced, or buried under other letters and papers, I would like to ask if you would be willing, in your capacity as Associate Attorney General, to be available for personal assistant, if I as chairman of the Administrative Practices and Procedures Subcommittee, have some difficulties in getting timely information from the Department of Justice?

Mr. **Reynolds**. Senator, if I am confirmed, I would be more than happy to make myself available for that purpose and to try to assist in any difficulties that might exist with regard to material that you have sought from the Department.

Senator **Grassley**. I appreciate that very much. Now just to back up to the second question. I asked you about the conflicting statistics between DOD and DOJ, and, just simply say to you that I do appreciate your cooperative answer, and if you would look into that matter, I would like to follow up with you on that.

Mr. **Reynolds**. Certainly, Senator. I would be happy to.

Senator **Grassley**. OK. Mr. Chairman, I am done with my questioning. Senator Heflin is outside. I believe he did have some questions.

Senator **Simon**. We have a vote on right now, too.

Senator **Grassley**. Would you like to have me recess, or just keep it going?

Senator **Simon**. Yes.

Senator **Grassley**. At request of the chairman, I would recess the committee until the chairman returns from the roll call that is now taking place in the Senate.

[A short recess was taken.]

Senator **Hatch**. Why don't we begin again, and as I understand it, Senator Grassley is finished, and Senator Heflin has some questions, and until he arrives, I'll just ask a question or two, and then we will turn the time over to him immediately when he gets here.

Mr. Reynolds, since the 1981 Antitrust Division has focused substantial attention and resources on the so-called, horizontal restraints, which are agreements in restraint of trade among direct competitors, in your view, is it appropriate to continue to place antitrust enforcement emphasis on price fixing and other agreements among direct competitors, such as in the number of bid rigging cases recently brought by the Department? And could you estimate the amount of money the Department has saved consumers and the Government by such cases?

Mr. **Reynolds**. Senator, I do think that's an appropriate point of focus for the Antitrust Division. I am not in a position to give an estimate with regard to that matter, although I am sure the Department has those estimates and could provide them to the committee.

Senator **Hatch**. OK. Congress, in 1978, amended Section 504 which prohibits discrimination against qualified handicapped persons to cover federally conducted programs.

Now, I understand that no regulatory action was taken to implement this congressional mandate until you took office.

Can you tell us what steps you have undertaken pursuant to the 1978 amendments, and am I right, that nothing really was done until you took office?

Mr. **Reynolds**. You are correct, Senator. When Congress passed the 1978 amendments, it directed the Federal Government to promulgate regulations that would be put in place to implement section 504 as it applies to federally conducted programs.

When we came into office, those regulations had not been fashioned. The Civil Rights Division has responsibility for coordinating that effort across the Government. We indeed did work with all the agencies in the Government—I think there are 91 different agencies—developed a prototype regulation to deal with 504 protections, circulated that to the agencies, and sent it out for notice and comment. I am pleased to say that now, a number of agencies have issued regulations in this regard, and the others have regulations that are in the notice and comment period, and I expect that we will have all agencies with regulations that address the 1978 amendment in the very near future.

Senator HATCH. Some people charge that you have undertaken little action on behalf of the employment rights of minorities.

Do you consider that a true accusation?

Mr. REYNOLDS. No, I don't, Senator. We have taken, I think, very aggressive action in the interest of employment rights for minorities.

I would start off with our employment discrimination cases that we have brought in the employment section. This administration has outstripped the prior administration considerably in the number of enforcement actions we have brought.

As I mentioned before, it has been 52 in the 4 years that I have been the Assistant Attorney General, and that is a larger number than the comparable 4-year period in the prior administration, and in only 2 of those enforcement actions, 2 out of those 52, have they dealt with the question that we refer to generally as reverse discrimination. All of the others have been on behalf of minority interests and women, to increase the employment opportunities of those individuals.

I would also point out with regard to our employment activity, that it was this administration that went to the Supreme Court and, in the face of, I believe, four or five court of appeals decisions to the contrary, argued that the section 504 employment provisions had a wide application, and indeed, applied to employment on behalf of handicapped individuals, and funded programs in their entirety, whether the primary purpose of the funding was employment or not.

We were successful in that case, and I think that was a dramatic step forward in the interest of employment rights for minority individuals.

Senator HATCH. One of the questions that we generally ask all nominees to the Department is, will you respond to our requests to appear and testify before any duly constituted committee of the U.S. Senate?

Mr. REYNOLDS. Senator, if I am confirmed, I will most certainly respond to any requests that are made to appear before the Senate, and to testify.

Senator HATCH. Mr. Reynolds, it has also been charged, that after your 1983 trip to Mississippi, that you rejected the filing of 10 of 11 law suits in Mississippi to enforce section 5 objections.

These objections were to new county redistricting plans that your staff had recommended. However, two amicus briefs were filed by you in private law suits in two other counties, contradicting the relief sought by the private litigants.

Would you respond to that?

Mr. **Reynolds**. Yes, Senator. With regard to the 10 law suits that you mentioned, my staff did indeed recommend that we file law suits in 10 different cases to enforce section 5.

At the time I got the recommendation, I talked to the private attorneys that were involved in those suits, as well as having further conversations with my staff, and it was the agreement of all of us that it made no sense for the Justice Department to come into those law suits, that there were already private actions pending, that we all felt that the courts were going to do what was asked in those cases, and that the involvement of the Federal Government at the 11th hour would probably be more disruptive than productive.

And for that reason, it was agreed by everybody, including the staff that originally recommended I go in, and the private attorneys, that we not go into those law suits. And therefore I declined to file them. The only purpose that would be served if I had would have been to add an additional number of cases to my roster of civil rights enforcement, and in the context of things, it seemed to me that was not a reason to do that.

On the two amicus briefs, filed in connection with section 5 cases, we there addressed the issue that was relevant to the Federal Government and to the section 5 process. The relief that we suggested to the court was the relief that would address earlier objections we had made to the redistricting proposals, and it was my staff, actually, that had recommended that the relief be fashioned the way it was and I agreed with them. It was indeed narrower than the relief that the private plaintiffs were asking for, but I felt, in light of the section 5 objection, we had to tailor our request to the matter that we had addressed in our objection.

Senator **Hatch**. Thank you. I have some other questions but I notice Senator Biden is here. Let's accord him the time, and as much time as we can, before we go to vote again.

Senator **Biden**. Apparently, Mr. Reynolds, we are going to have to leave again in a moment because that last vote must have failed, or passed by 1 vote, because someone made a motion to reconsider the vote by which it failed or passed.

Senator **Hatch**. It was a tie vote as I understand it.

Senator **Biden**. Let me go back to where I left off, which was the issue of whether or not the exclusion of black legislators from the final decisionmaking process was a problem, and as I understand your answer, you concluded it was not a problem, and one of the reasons why was because the Governor's people were also excluded. Is that correct?

Mr. **Reynolds**. Well, I am not sure that is precisely what I was saying.

Senator **Biden**. Well, why don't you say it again.

Mr. **Reynolds**. Well, I think it is fair to say that was one of the factors we considered when we probed the mind of the legislative body, and I think that it is also fair to say that our probing of that legislative mind in this regard convinced everybody that looked at it that you could not ascribe racial purpose to the legislators.

And one of the factors in that examination was the one that you have highlighted, and I did say that——

Senator **Biden**. I highlight it only because you mentioned it as one of the factors.

Mr. **Reynolds**. I say, I think it is one that was certainly in the mix, and I had just mentioned to you that one of the purposes for excluding them was to exclude both the protagonists and the antagonists in the redistricting process at the time.

Senator **Biden**. My understanding from a memo, that I am not sure we are able to put in the record based on our agreement, is that the actual work of hammering out this settlement, according to your staff—an internal memorandum—was that the actual work of hammering out the settlement took place in the Senate computer room in the State capital basement, and the Governor's suite upstairs.

So apparently, the Governor was very much—based on my understanding of the facts, the only parties excluded from these final negotiations were the blacks.

The Governor was deeply involved in hammering out the final solution, or his office was, and, the State legislators were deeply involved in hammering out the solution. Everyone was there but the black folk.

Mr. **Reynolds**. I do not believe that is correct, Senator.

Senator **Biden**. No?

Mr. **Reynolds**. What did happen, as I understand it, is that the compromise was hammered out in the computer room, and was then taken to the Governor's office because there was, again, the question of whether the Governor would veto or would not veto the plan once it had been devised.

It was under those circumstances then, that the Governor's office had to be brought into the matter, once they had reached a compromise, to see whether indeed it was one that he would veto.

Senator **Biden**. Well, it seems to me that's a distinction, not a difference. The final agreement was hammered out between the Governor and the legislators who were white. No black legislators were a part of that hammering out process, right?

Mr. **Reynolds**. I guess that that would be correct.

Senator **Biden**. And that is not a problem? I mean, that did not cause you concern?

Mr. **Reynolds**. Well, Senator, your characterization of what might or might not have caused me concern—I guess I would preface my remark by saying this particular redistricting caused considerable concern. It was one that I was personally involved in from the beginning.

It was one that I wrestled with, I worked at from start to finish. It was one that I had numerous discussions of with my staff; we went through numerous analyses, and certainly, all of these things that you are bringing up caused me concern.

Senator **Biden**. In reading the mind of the legislature and the Governor, did the fact that black legislators did not participate, did that lead you toward the conclusion that there was discriminatory intent here, or, did it lead you away from that, or did it not matter? That is what I am trying to get at.

Mr. **Reynolds**. Senator, I think it did matter. I think it was one of the ingredients that was considered, and considered very carefully. As I say again, it was the considered judgment of the staff, and me, after we had reviewed all of the factors—and we have only touched on but a small number in this complex redistricting—that the legislature was not motivated by racial purpose, and indeed, everybody then focused on whether it was Governor Treen's participation in this that was racially motivated such as to defeat the redistricting.

But I think all of these matters that you have raised were pieces of a larger puzzle. They all were of legitimate and serious concern. I certainly took them seriously, I probed them and I reviewed them all, and the question was, when you put all of that together, in the final anlysis, what is your best judgment as to the redistricting activity?

Senator BIDEN. Well, let's talk about another piece. The alleged gerrymandered shape of this duck-shaped district that was precleared.

The court, rather dramatically described the alleged shape in the following, when it says:

> Act 20's, jagged line dissects a large concentrated community of black voters residing in Orleans Parish, dispersing that community into the First and Second Congressional District. With unerring precision, the line slices through the city's traditional political subunit, the ward, in a racially selective manner, leaving intact predominantly white wards, while carving up those densely populated by blacks. Homogeneous black precincts are separated. White precincts are not.

Now, my question to you is, as you pre-cleared the plan, had you studied in sufficient detail the actual physical makeup of the district, and whether or not the line sliced through, to use the court's words, "in a racially selective manner, leaving intact predominantly white wards, while carving up those in densely populated black wards"?

Mr. REYNOLDS. Well, Senator, I certainly did review the configuration in minute detail, and went over it carefully over and over again, and I think that as to some features of the line drawing, it can be said that that description fits, and I think as to other features, it can be said that it carved up white wards and did not leave them in the same kind of a situation as was described in this particular area.

The problem you have in any redistricting is that you are going to draw lines through population areas, and in doing that, there is going to be some fragmentation and there is going to be division of communities, and my judgment on this has to be, in those circumstances, whether or not that line drawing was done in a way that was designed to deprive the minority population——

Senator BIDEN. But it would cause you alarm, would it not, if in fact you looked down, and all the white wards remained intact, but the black wards were split? I mean, that is enough to send up an alarm bell, is it not?

Mr. REYNOLDS. That is certainly enough to send up an alarm bell. I think that overstates what the situation was as far as the whole redistricting is concerned, but certainly as to certain portions of it, and as the court pointed out, that is a correct characterization.

Senator BIDEN. Put it in another context. Is it not true that black wards were impacted upon in terms of a change in shape and configuration much more than the white wards were in that area, is that not true?

Mr. **Reynolds**. I think certainly in the New Orleans-Jefferson County area, that was correct, and part of that had to do with the concentration of the community of black voters that resided in that area, and the whole question, really, was one that the court iself pointed out as being a difficult one, and that's whether you are going to have one single majority district where all the black voters are packed into one district, or whether you are going to do some degree of fragmentation in order to give the black voters two influence districts so they can have an opportunity to have an influence for two seats rather than one seat.

Senator **Biden**. See, the problem——

Senator **Hatch**. Senator Biden, we had better get——

Senator **Biden**. Yes, I know. Let me just make a statement because we will come back to this. The problem some of us have with that kind of rationale is sort of the old notion that, you know, "We really know what's best for you now. Don't concentrate your power or you're going to dilute that power." And the rationale, by well-intentioned white folks, to say, "You're really better served having 40 percent in two districts than having a predominance in one district and electing a Congressperson."

I mean, that is why a lot of this is so suspect. We have heard that kind of rationale before, and when any white man or woman uses that kind of language with me, it is a little bit like some of my best friends. It sends up alarm bells because history indicates that that is the rationalization that was almost always used to justify discrimination.

But I will be back. I realize that is not a section 2 or a section 5 judgment. It is just trying to explain to you why some of us are concerned.

Senator **Hatch**. Thank you. We will recess until we can get back from this vote. I apologize to you, Mr. Reynolds, but I think you are fully aware of this problem.

[Whereupon, a recess was taken.]

Senator **Specter** [presiding]. Mr. Reynolds, we shall begin again. We had just had a vote on the Senate floor which was a tie vote, and that produced a motion to reconsider which produced a second vote. So this proceeding is sort of like Ascraft versus Tennessee. It is relay. And we can proceed now to try to make use of this time in the interim since I have already been to the floor and have voted.

Let me return to the general subject that I was discussing with you when my time expired at the end of the morning session. And that is with respect to your plans as to future litigation under your view of the *Memphis Firefighters* case.

And as I understand your position, to use the term which you had initiated, you would not pick any more fights. And by that, I take it to mean that on the 51 matters where the Department of Justice had written letters and litigation had been begun on some of those matters, on the initiation of the Department of Justice?

Mr. **Reynolds**. That is correct.

Senator **Specter**. And on how many of those 51 matters?

Mr. **Reynolds**. Well, I believe it is one or two that we have filed—we have had a lawsuit—we are involved in a lawsuit on.

Senator **Specter**. Well, what was the point of origin of these other cases in the sixth circuit——

Mr. **Reynolds**. They were cases that were brought by people other than the Department of Justice. And we were not involved in. And some of those, well, they were brought by others.

Senator **Specter**. And what was the situation with Indianapolis? Had that matter been initiated by the Department of Justice?

Mr. **Reynolds**. That was one that we initiated. That is correct, Senator.

Senator **Specter**. You say then you initiated one or two cases?

Mr. **Reynolds**. Well, we also have a case in Buffalo but actually I think that was initiated by the private plaintiffs. And we were party to the decree and filed suit in that case.

Senator **Specter**. So what you said this morning that you were prepared to do as a change in policy would be on—you would not—maybe it would not be a change in policy, maybe you had not planned to initiate any more cases, but perhaps it is a change in policy. But, in any event, you would not initiate any new cases or, as you articulated it, pick any new fights among the 51 matters which you had already identified that is possible prelitigation matters?

Mr. **Reynolds**. I think with the one qualification that I had indicated to you this morning, Senator, we would not be interested in initiating the litigation and would only be involved in litigation on these matters in the event that it became necessary because of the circumstances that I explained to you before or because the litigation was in the courts and we had to respond as a party on it.

Senator **Specter**. So somebody else initiates the litigation and then obviously you have to respond as a party, or if there is some—you did not categorize it this way, but some substantial change in position by rehiring or some change in the hiring policies in one of those cities or governmental subunits which you felt were barred your intervention?

Mr. **Reynolds**. That is right, although that circumstance might not require it, Senator. I am just suggesting that it might and I wanted to leave that.

Senator **Specter**. That is what I wanted to explore with you. What about such matters would require your intervention?

Mr. **Reynolds**. Well, I think that if we are party to a court decree that has a provision in it that calls for a quota hiring or a quota promotion procedure, and a jurisdiction does indeed undertake to initiate new hires or new promotions pursuant to that kind of a procedure, then we would at that point have to advise the court that we felt, in light of the Supreme Court decision, there was a problem with them implementing the court decree in that regard.

Senator **Specter**. You anticipate intervention by the Department of Justice in the case of *Chromnick* v. *School District of Philadelphia?*

Mr. **Reynolds**. Well, I cannot——

Senator **Specter**. That is the third circuit.

Mr. **Reynolds**. That is a third circuit case, Senator, and I believe that is the case that raises the issue that is now before the Supreme Court in a case called *Wygant* v. *Jackson School Board*. It is not really the *Stotts* issue. It is a question of whether a voluntary arrangement by a municipality and its employees that does contemplate quotas is constitutional or unconstitutional. That is the issue that is before the Supreme Court. Whether we would intervene or file an amicus brief in *Chromnick* is not a decision that I have had before me.

Senator SPECTER. Well, on the standard you just articulated, there would not appear to be any reason for you to, would there? Or is there something I am missing in the *Chromnick* case?

Mr. REYNOLDS. Well, the *Chromnick* case is not a *Stotts* case, Senator, so it seems to me that that would raise a different consideration.

Chromnick does involve a separate consitutional issue as I mentioned.

Senator SPECTER. You say that does not involve the issue of the *Memphis Firefighters* case?

Mr. REYNOLDS. I believe that Justice White specifically reserved in the *Memphis Firefighters* the question of a voluntary arrangement by a public employer, and I think that *Chromnick* is a case that does indeed squarely present that issue.

Senator SPECTER. That is true. And the third circuit, in *Chromnick*, said that that was a reserved question and they would not reach the problems of Stotts.

Mr. REYNOLDS. That is my understanding of the decision, Senator.

Senator SPECTER. So the long and short of it is you do not know whether you would get into Chromnick or not?

Mr. REYNOLDS. Well, I think *Chromnick* is a third circuit decision, and if it were at this juncture, the next level would either be on a rehearing petition or to the Supreme Court. My sense is that the issue has been joined, and if we were to speak to it, it would probably be only in terms of an amicus filing.

Senator SPECTER. Well, the decision was made by the Court of Appeals for the third circuit on July 17, 1984, so it is almost a year old.

I would appreciate it, Mr. Reynolds, if you would take a look at the case and let me know, if you can.

Mr. REYNOLDS. I would be happy to, Senator.

Senator SPECTER. Let me get into an antitrust question at this time, Mr. Reynolds, and that is the antitrust issue raised by Conrail.

Have you had occasion to review Mr. McGrath's letter on the Conrail situation?

Mr. REYNOLDS. I have read—which letter, Senator, I am sorry?

Senator SPECTER. Well, he has a letter—there is only one letter that I know of that deals with the antitrust question he has written saying that the acquisition of Conrail by Norfolk would constitute a violation of the antitrust laws unless there is divestiture which would maintain competition.

Mr. REYNOLDS. I am generally familiar with that letter, Senator.

Senator SPECTER. My question goes to two points—my questions go to two points.

One is as to procedure and the other is as to substance.

My own view is that the matter is such an enormous one for the transportation system of the country, obviously very important to my State, but very important to the country, that the Congress ought not be called upon to make a judgment on the sale until we see who the possible acquirors are under a divestiture arrangements. There are two possible acquirors who have emerged so far, Pittsburgh & Lake Erie Railroad, and Guilford Railroad.

And my question to you is, do you agree that the Congress ought to know the specifics of the divestiture to make a determination as to whether there can be a competition between a merged line, Conrail-Norfolk, and some line, Guilford, Pittsburgh & Lake Erie, which takes over the certain lines?

Mr. REYNOLDS. Senator, I think that the Department of Transportation is probably in the best position to answer that specifically.

There are, as I understand it, competing concerns here that everybody does indeed need to take into account. The timing of the sale, as I understand it, is something that is relevant in order for it to be a viable kind of a divestiture in the first place. How those timing considerations fit into the overall evaluation question is something that I am just not in a position to speak to. I do know that the Department of Justice has committed to the Congress that it is going to review the divestiture plan and all of its details under some very rigid criteria, and that unless it is satisfied that that divestiture plan renders the entire transaction proper under the antitrust laws, it would not give its ultimate approval.

Senator SPECTER. Let me ask you to do this in the interest of time. I would like you to take a look at it. Congress is not going to decide that matter overnight in any event. There has been some thought there could have been a decision by the Congress as early as April. The Commerce Committee had reported out the bill.

My own hope would be that the Justice Department would get down to the specifics with P&LE, Guilford, and make your determination as promptly as you can. The matter has been holding fire for some time.

Secretary Dole made her decision before the end of the last year and the Justice letter, Mr. McGrath, was in January of this year. I would urge you to take a look at that, and see if a timetable can be constructed so that Justice can make a response as to whether there is or is not an antitrust violation in the context of the specific divestiture. I would like to know whether you think that can be done. If that can be done within the course of the next 60 or 90 days, I believe Congress will not attack it. If it cannot be done within say a 60- to 90-day timeframe, I would like your opinion as to whether Congress ought to hold up on its decision until it is done. I feel very strongly that we should because of very important issues. But it is too complicated really and not fair really to ask you to decide that kind of a question on one foot. There is a lot to it.

But it is a very important issue to Pennsylvania and really the country.

Mr. REYNOLDS. Senator, if I am confirmed, I will certainly look into that matter that you asked me to look into and report back to you.

Senator SPECTER. Well, I would like you to look into it before you are confirmed. [Laughter.]

I would like you to—let me pose the question specifically.

I would like you to tell me if the Justice Department can make a determination within 90 days whether a divestiture to the Guilford and Pittsburgh & Lake Erie would or would not violate the antitrust laws.

If the answer to that is no, the second question is do you think that the Justice Department ought to make that determination before Congress is called upon to vote yes or no on the sale of Conrail to Norfolk.

Those are my two questions.

Let me move on to some more questions because it is getting to be a long day for you, Mr. Reynolds, and I would like to wrap up on this round of questioning.

There is a very important issue which has arisen on the Office of Juvenile Justice and Delinquency Prevention. And that relates to an administration proposal to reprogram primarily to the Marshal's Service approximately $13 million in unobligated funds previously appropriated for special emphasis grants for the Office of Juvenile Justice and Delinquency Prevention in fiscal year 1984.

The Juvenile Justice Act requires that unobligated funds be allocated to the States under the formula grant program. I have—my question is, are you familiar with this?

Mr. REYNOLDS. No, I am not.

Senator SPECTER. Well, would you give me an answer to that too? We are very anxious in the Juvenile Justice Subcommittee to see that these funds are utilized. And this is a traditional tug of war. There has been an effort by the administration to zero out OJJDP. Attorney General Meese testified in his confirmation hearings that he was in favor of it. And this is a good time to focus on this issue. And I would appreciate knowing your position on it. Because this will come within your purview as you outline the delineation of responsibilities contemplated within the Department.

Mr. REYNOLDS. All right, Senator.

Senator SPECTER. Let me ask you about another question that I consider to be very important, and that is prosecutorial discretion, although I realize, as you have outlined the division, that criminal matters will come within the Deputy Attorney General.

And the question that I have relates to a Department policy on accepting guilty pleas from corporations which result in fines and lack of prosecution of the individuals who made be responsible.

As you know, Mr. Reynolds, I served as District Attorney in Philadelphia for 8 years, and was in the middle of many, many prosecutions of corporations where individuals were indicted, and I say that by way of some background to an appreciation of the difficult to prove specific identity of who did what in a corporate transaction.

But I am concerned that the Department of Justice may be moving upon the easier route in taking a plea bargain as to the corporation fine as opposed to pursuing an investigation which might lead to evidence against individuals. And the concern arises because however hefty the fine, it is relatively insignificant for the corporation in many circumstances.

And I think back to the electrical cases where Judge Gainey in Philadelphia in the early 1960s proposed jail sentences on corporate officials. The first time I believe that that was done and it had a miraculous therapeutic effect. And I have seen, as a prosecutor, that the enormous difference between fining a corporation, which is relatively meaningless, and sending a corporate official to jail, sends tremors through the entire business community where those kinds of transactions are engaged in.

And I would like to have your sense as to what might be done by way of congressional action or congressional oversight to try to establish some standards which would assure this committee and assure the public that the Department of Justice is doing everything that it possibly can to pursue an indictment against individuals where that is realistic as opposed to simply taking the plea from the corporation with a fine.

Mr. REYNOLDS. Senator, the——

Senator HATCH. Senator, your time has expired.

Mr. REYNOLDS. May I answer?

Senator HATCH. Go ahead and answer.

Mr. REYNOLDS. I was going to say that is not in my area, Senator. I would say that the policy of the Department of Justice is very much to pursue the individuals in those kinds of situations and where appropriate to include them in indictments and to press against them in terms of the full measure of the law.

I do know that the Department is scheduled for hearings on—I believe on the E.F. Hutton matter—tomorrow, and that there are briefings that are going to be made to the Senators. I think that in that discussion there will be a very much clearer picture of exactly the policy of the Department and what the Attorney General's aims are and intent is in that area. I think that that will help very much to clarify the matter and to advise the Senate as to how the Attorney General is going to approach these prosecutions.

Senator SPECTER. Thank you very much.

Thank you, Mr. Chairman.

Senator HATCH [presiding]. Thank you.

Senator Heflin.

Senator HEFLIN. Mr. Reynolds, there has been a lot of discussion about the letters that have gone out pertaining to reopening of some 51 cases that have been mostly, I suppose, entered into by consent in a consent decrees.

Basically, do you have any problems with the idea that, a judgment by consent is as binding and conclusive upon the parties as a litigated case? Do you see any difference between this type of case and the case that might be litigated as to the res judicata of the decision?

Mr. REYNOLDS. Well, Senator, I think that they are as binding and that a case that is entered into by consent and then entered by the court as a consent decree has the same force and effect as a litigated order of the court.

Senator HEFLIN. Now, as I understand it, your proposed action deals primarily with the future rather than the past in these cases since arising from consent decrees.

Is that correct?

Mr. **Reynolds**. It deals only with the future and will not—it is only prospective.

Senator **Heflin**. There is a problem here of future dealings with the Department of Justice in cases in which a consent decree is entered. Will the reopening of this have some chilling effect upon future settlements that might be reached?

Mr. **Reynolds**. I do not believe so, Senator. These consent decrees were in effect when I came into office, and we did not undertake at that time to seek modification of them or to alter our commitments under those decrees.

What we are doing in this circumstance with regard to the letters that we sent out is to indicate that under a 60B motion that can be filed with the court—hopefully by both parties jointly rather than unilaterally—that those decrees can be modified as a result of a change of law that has taken place since they went into effect.

But we very definitely did not go in initially, notwithstanding our views as to quota relief under any of these consent decrees, and seek to dismantle them until we were able to proceed on the basis of a change of law as we understood it as a result of the *Memphis Firefighters* case.

Senator **Heflin**. Well, in the event that the parties object to the reopening, has the policy of the Department of Justice been determined as to what course of action is going to be pursued in the event that there is no agreement on the part of the local governing body involved?

Mr. **Reynolds**. Senator, what we have confronting us is a difference of opinion among the number of jurisdictions as to the interpretations of the Supreme Court decisions, and our view is that when we are confronted with that is to take the matter back to Court and have them clarify that interpretation, and that is what we did. As I indicated to Senator Specter, we believe the issue has been joined in a number of Courts. We have some Circuit Courts now that have suggested a narrower interpretation, and as to the jurisdictions that would be in those circuits, we certainly would not be going back in and asking for modifications until those court of appeals decisions are finally resolved. As to the other ones, as I indicated we do not have any intention of going back into Court unless it can be on a joint motion with the other party and unless there are special circumstances that warrant actually taking the issue to Court.

Senator **Heflin**. Is there any distinction to be drawn that what you are doing is attempting to change now, according to your interpretation of the Supreme Court, a remedy as opposed to a finding? It would appear to me that in the overall matter of litigation that remedies can be agreed to unless there is a prohibition.

Now, people have different interpretations of the *Stotts* case, but remedies are sometimes looked upon in a different light than a question of a finding of discrimination which brings about the remedy. Do you see a distinction as to whether people by consent can agree to things as long as they are not prohibited by law?

Mr. **Reynolds**. I think that there is—I think that is right, that people can agree to things as long as they are not prohibited by law. What we have in this instance are a number of jurisdictions that agreed and then went to court, and the court approved it as a consent order, and also some of the jurisdictions that have indeed gone through a full litigation; and there has been a court order as a result of that litigation that was not by agreement; and in those of both categories a remedy did include certain quota provision, and we feel that the ruling of the Supreme Court said that the Courts do not have authority to issue that kind of relief.

What we are saying, therefore, as to future hires and promotions, we are asking to substitute affirmative action in terms of outreach programs that we have used for the last 4 years in our employment decrees; outreach training and recruitment devices rather than use the quota devices that had been put into place prior to the Supreme Court decision.

Senator **Heflin**. But if the remedy was entered into by consent, without any determination of the remedy by a court, do you think that you have a right to go in and reopen that type of case?

Mr. **Reynolds**. I think that the Supreme Court now has before it precisely the kind of a case that you have reference to, where parties by consent have agreed in a collective bargaining agreement to quota relief in layoff situations, and the Court, because a public employer is involved, has granted certiorari to review whether or not a public employer can, by consent and voluntarily, enter into a collective bargaining agreement that contemplates quota relief tied to the race or gender of standards of particular employees.

Senator **Heflin**. Let me ask you about the settlement relocation matter that Senator Kennedy asked you about. I am not familiar with all of the facts on it, but I am trying to become familiar with it and get a little better understanding.

In some memoranda that I have seen, there is an indication that the Court was not in the precinct in which those voters who were voting—that it was in a separate precinct. Is that correct or do you know?

Mr. **Reynolds**. I think it was in the same precinct, but that it was not in the black community.

Senator **Heflin**. There may be a distinction between precincts or voting places; I am not sure. I want to check on that further. That is all right now.

Mr. **Reynolds**. I will have to check on it, too, Senator.

Senator **Specter**. Thank you very much, Senator Heflin.

Senator Leahy.

Senator **Leahy**. Thank you, Mr. Chairman.

Mr. Reynolds, one of the things that we have learned since 1981 is that the written laws that we have protecting rights of minorities, handicapped, women, and children, are really not enough. Laws depend on how well we enforce them. However the laws by themselves, even though they are not perfect, they are models for the rest of the world.

Recently I think there has been a progressive change in this country. But one of the things I have learned is that you have to have vigorous advocacy of laws if they are going to succeed at all, and frankly, I think the most we have gotten in the past 4½ years is lip service. We have proceeded very slowly on school desegregation, actually seeking reversal of gains that had been made; the same on voting rights cases the administration inherited. There has been retrenchment on the progress of a generation, under both Democratic and Republican administrations, so I think there has been consternation among my constituents in Vermont, and certainly you have to ask why does this happen? We are partly judged by how well we protect the rights of minorities, how far we open the doors of full participation to, all Americans.

Seeing Senator Specter here reminds me of the time that he and I questioned you during hearings on the Voting Rights Act in 1982. Let me go back to that. I asked you at that time whether the Justice Department filed a brief in the Supreme Court case of *Rogers* v. *Lodge* where both the district court and the court of appeals found evidence of a discriminatory purpose. You decided not to file a brief because the case involved factual determinations. You replied to Senator Specter that you did not file because of your limited departmental resources.

Now, I cannot speak for Senator Specter, but I think it is fair to say we both took your answer on face value; but it has troubled me. I have gone back and looked at other documents from that time in connection with today's hearing. I have a memorandum from you to Rex Lee, dated January 4, 1982, in which you make it clear you did not file a brief in this case because you supported the defendant's position. This is not the answer you gave to Senator Specter and myself, and I will quote what you said in discussing the precedent.

You said ". . . any participation by the United States as amicus in the *Rogers* case should be in support of the petitioners, urging reversal of the panel majority below. Regrettably, because I received the appellate section's analysis and recommendation in this case after petitioners brief on the merits had been filed, the preferred course of action—which would be to participate as amicus in support of petitioners—is foreclosed. Accordingly, my recommendation—albeit with considerable disappointment—is that the United States not participate."

Why did you not simply tell us in 1982 that you did not file a brief with the Supreme Court because you supported the other side?

Mr. REYNOLDS. Well, Senator, the decision whether we filed a brief in the Supreme Court is up to the Solicitor General. What you are reading is a memorandum of my views at that time, which I communicated to the Solicitor General——

Senator LEAHY. You are missing my point.

You told me that you did not file because the case involved facts in determination. You told Senator Specter it was because of your limited resources. That has nothing to do with the Solicitor General.

In this case, you said you supported the other side. Why did you not say that to us?

Mr. REYNOLDS. The decision was still open as to whether we would file a brief on the side of the petitioners, notwithstanding my recommendation to file in the other side. The determination not to do it was based on the Solicitor General's judgment that we would not go in on that side, even though I had recommended——

Senator LEAHY. Mr. Reynolds, you say that you advised the Solicitor General not to file because of your limited departmental resources; because the case involved facts of determination; and because you supported the other side. Which of those three answers is the correct one?

Mr. **Reynolds**. I do not see any inconsistency at all, Senator. I advised Rex Lee as we do routinely on cases. The Solicitor General makes the decision on filing cases in the Supreme Court. He even had the decision after I made my decision to go in on the top side of the case, to go in on the other side. His judgment was that it was fact bound, and indeed the brief would not be filed.

You asked me what the view was of the Department as to filing the brief, and I answered you.

Senator **Leahy**. So you do not think that there is anything at all contradictory between what you told Senator Specter and myself and what you wrote to Rex Lee?

Mr. **Reynolds**. Well, I think what I wrote to Rex Lee was my views on how we should participate in the *Rogers* case.

Senator **Leahy**. Your answers to us were not your views?

Mr. **Reynolds**. You did not ask me my views. You asked me why the Department did not file, and I tried to answer that question.

Senator **Leahy**. Mr. Reynolds, you almost make a stereotype of nitpicking lawyers with that type of answer.

Let me ask you another question.

I have received letters about remarks you were alleged to have made during a staff meeting regarding the *Charleston, South Carolina School District* desegregation case. I will give you a chance to say just exactly what happened.

On the show, "Agronsky & Co.," Mr. Rowan stated you said in reference to the case, "make those bastards jump through every legal hoop before we acquiesce to every intervenor."

You wrote to Mr. Rowan stating, "Let me state as clearly as I can that I never admitted to making the statement in question. I know the quote was not mine."

I am not sure just whether that affirms or denies. Did you make any statement, either in these words or substantially in these words, referring to that school desegregation case, "make those bastards jump through every legal hoop before we acquiesce to their intervention?"

Mr. **Reynolds**. I have no recollection of making that statement, Senator, and I do not believe I did.

Senator **Leahy**. Something that significant, you would remember it, would you not?

Mr. **Reynolds**. I think I would have that recollection.

Senator **Leahy**. If you wrote to Mr. Rowan about whether you made it or not, that was 2 years ago.

Mr. **Reynolds**. At the time that I wrote to Mr. Rowan I had no recollection of making that statement.

Senator **Leahy**. So you say you did not use the word "bastard"?

Mr. **Reynolds**. I have no recollection of making that statement.

Senator **Leahy**. Do you recollect whether you used the words "intervenors through the hoops"——

Mr. **Reynolds**. I have no recollection of that statement, Senator.

Senator **Leahy**. But in your letter to Mr. Rowan all you denied was that you had admitted to making the statement.

Mr. REYNOLDS. I do not believe I ever admitted to making the statement.

Senator LEAHY. Well, you do not—you have no recollection of making it. You are not saying whether you made it or not, but you have no recollection of ever making it?

Mr. REYNOLDS. I have no recollection of it.

Senator LEAHY. And you feel that your answer to Senator Specter was not inconsistent with what you said to Mr. Lee?

Mr. REYNOLDS. I think that anyone could construe any inconsistency between the answer that I gave to your question and my views that I expressed to the Solicitor General, certainly; but I do not think that that suggested that my answer to your question was unresponsive.

Senator LEAHY. Just inconsistent?

Mr. REYNOLDS. Your question was why the Department did not file in the case. My memorandum addressed to the Solicitor General were my views on the position that we should take in that litigation.

Senator LEAHY. But you say now you see an inconsistency between your answers to Senator Specter and me and what you said to Mr. Lee.

Mr. REYNOLDS. I am not sure I understand.

Senator LEAHY. Is your statement to Mr. Lee and your statement to us consistent?

Mr. REYNOLDS. I think they are consistent; that is right.

Senator LEAHY. You really see a consistency in them? In one case you said that you support the defendant's position and to us you said you did not file simply because of limited department resources.

Mr. REYNOLDS. At the time I wrote the memo, Senator, the time had already expired when we could possibly have gone in and filed a brief of the sort that I had recommended. The question then was whether the Department was going to file on the other side, and that determination was made by the Solicitor General.

Senator LEAHY. Now that we are on the subject of the Solicitor General, and the memorandum to him, you urged the Government to support the constitutionality of Alabama's moment of silence statute, which the Supreme Court found invalid; and speaking of the landmark school prayer case, you stated, "Our position in the Supreme Court must be crafted in such a way to make abundantly clear that we view Kemp and Engel as wrong and unworthy of respect."

Now, these kinds of words, "unworthy of respect," really trouble me, Mr. Reynolds. In other words, the opinion of the Supreme Court is unworthy of respect, according to you. As an official in the Justice Department you are sworn, as we are, to uphold the Constitution. Obviously, you differ intellectually with what the Court said in the case, and all of us can.

Do you regard the question of following the law optionable, depending upon whether or not you respect a particular decision or not?

Mr. REYNOLDS. I think when the Supreme Court has spoken you have to abide by the Supreme Court decision. I do not believe that means we necessarily have to agree with the decision of the Supreme Court, but every decision of the Supreme Court——

Senator **Leahy**. And do you feel that you have the option to find the decisions of the Supreme Court as unworthy of respect?

Mr. **Reynolds**. I certainly feel *Plessey* v. *Ferguson* was unworthy of respect, Senator, and there are other cases that I would fit into that category.

Senator **Leahy**. We have a lot of Supreme Court cases that you are sworn to uphold. Certainly, you can argue for reversal—but unworthy of respect? You are one of the chief law enforcement officials of this country. You set the standard for law enforcement of this country. You said that the Constitution, as interpreted by the Supreme Court, is unworthy of respect. Do not those words trouble you? Yes or no? Do they trouble you? They are your words.

Mr. **Reynolds**. Senator, I believe that in the internal memo that you are referring to that it was not an inappropriate way to characterize that.

Senator **Leahy**. You do not find them inappropriate? That is your answer?

Mr. **Reynolds**. I think a personal view of Supreme Court decisions, certainly, depending on——

Senator **Leahy**. This is not a personal view. You say, "Our position." Our position of the Supreme Court must be crafted in such a way as to make abundantly clear that we view the statements as wrong and unworthy of respect. You are prefectly willing, and I am perfectly willing to concede that you can have whatever personal views you want, but you are speaking for the Justice Department, which represents all of us, all of us as Americans. You are speaking for me and you are speaking for Senator Hatch—and everybody in this room—all of us when you say "unworthy of respect." Now, you say those words do not trouble you in that context?

Mr. **Reynolds**. No, Senator.

Chairman **Hatch**. Senator, your time has expired.

Let me ask you, Mr. Reynolds, I was not here, but did you actually call the Supreme Court decisions unworthy of respect?

Mr. **Reynolds**. It was an internal memorandum that I wrote to the Solicitor General and I used that phrase in regard to the Supreme Court ruling on school prayer cases.

Chairman **Hatch**. Well, I certainly agree with that. I think there is room to disagree with some of those cases. With regard to the labor decision, you have not said that you do not intend to uphold it, do you?

Mr. **Reynolds**. No. I said to the contrary. I said we intend to uphold it, and indeed will uphold it.

Chairman **Hatch**. You said you do intend to uphold it to the extent of your authority; is that right?

Mr. **Reynolds**. That is correct. Our authority in that area is limited because the Department of Justice's authority is basically in the public employment area; but I certainly feel that the Supreme Court decision is on the books and has to be upheld. I think the school prayer decisions are on the books and they have to be upheld, likewise.

Chairman **Hatch**. All you have said is that you disagree with the decisions; is that correct?

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Mr. **Reynolds**. That is correct.

Chairman **Hatch**. Well, join the crowd. There are a lot of people who disagree in this country. A lot of union members, and even Senator Leahy, I have heard disagree from time to time with the Supreme Court decisions. It is the nature of Court watching in this country.

Senator **Leahy**. Mr. Chairman, if I might respond to that, there are certainly cases that I have disagreed with and, as a prosecutor, I have had cases that I disagreed with, but I would never go to the point of saying that the case, and thus by inference the Court itself, was unworthy of respect. This is entirely a different thing. Reading the memo, this is not a case of one of us saying that we happen to disagree with a case. Certainly we do if we file appellate briefs on cases that we have lost and we are appealing. Each of us have done that. I am talking about the chief law enforcement officials of this country sending out a memo citing a case considered unworthy of respect. It is that terminology that bothers me.

Chairman **Hatch**. Maybe it was a poor choice of terminology.

Senator **Leahy**. Well, Mr. Reynolds feels not.

Chairman **Hatch**. Well, be that as it may. Maybe it was not. I think the *Dred Scott* decision was unworthy of respect. I do not think anybody who looked at that decision, which was the all-time worst decision, most prejudiced racial decision in the history of this country, was worthy of respect.

Senator **Leahy**. It was overruled, too, reversed.

Chairman **Hatch**. And so, probably, will *Weber*, some day, but the problem——

We will have order or we will clear the room. You can disagree in this room, but we are going to show respect for Senators; and we are going to show respect for witnesses, regardless of their beliefs, and I think that *Weber* may very well be overruled some day. There are a lot of people who support civil rights who would like to see it overruled.

Now, maybe it will not. There are a lot of people who support civil rights who do not want it overruled. You mentioned *Plessey* v. *Ferguson*. You said that is a decision that you thought was unworthy of respect; is that right?

Mr. **Reynolds**. I did indicate that.

Chairman **Hatch**. Why do you think that was unworthy of respect.

Mr. **Reynolds**. I think as a matter of constitutional analysis and policy, it was one of the poorer decisions to come out of the Supreme Court.

Chairman **Hatch**. Why?

Mr. **Reynolds**. *Plessey* v. *Ferguson* condoned or authorized a racial-conscious approach to our Constitution.

Chairman **Hatch**. Separate but equal?

Mr. **Reynolds**. That is correct.

Chairman **Hatch**. I will bet that everybody who is in favor of civil rights feels the same way you do, that *Plessey* v. *Ferguson*, which is now overruled, was unworthy and is unworthy of respect today. I suspect we would come up with other cases. Some very strong people in our society, wonderful, good people, good legal craftsmen, artisans in the law, feel that *Roe* v. *Wade* is not worthy of respect. Who can say? So I think it was probably a poor choice of words.

Senator LEAHY. That was the purpose of my question, Mr. Chairman.

Chairman HATCH. I do not want to see it badgered to death when there are cases that are not worthy of respect and I think members of this committee would say it, and I think you would say it, too.

Senator LEAHY. We are moving forward.

Chairman HATCH. Well, I can say this. This was an internal memo. It may have been an unfortunate choice of words, but I think Mr. Reynolds has more than adequately demonstrated that he has been very strong in favor of civil rights; and I might add that Mr. Reynolds has said nothing about any refusal to abide by the letter of the law. He has simply said that he considered the Supreme Court decision an offensive one, and if you are alone in that, then most of the newspaper would say that they criticized cases similarly. You never have said, though, that the Supreme Court was unworthy of respect, did you?

Mr. REYNOLDS. No; I never said that. I do not believe that and I would never say that.

Chairman HATCH. The only reason I went through that is because there are cases which are unworthy of respect. So what? Does that mean that you do not uphold civil rights laws or will not uphold the cases as they exist on the books even though you disagree with them?

Mr. REYNOLDS. Senator, that does not mean that at all. My commitment in civil rights is well established in terms of the enforcement record that we have put together in this administration in the past 4 years. We are opposed to discrimination, and what we have done, and done very effectively, I think, on every front, is to have fought discrimination on the basis of race, sex, creed, color, national origin. We indeed could be criticized more for having gone further in this effort than to talk about us being criticized for being constrained or retreating. This administration is, I think, way out in the forefront in terms of fighting the battle against discrimination; and in every place that we see discrimination on account of race, gender, national origin, or handicap, we have filed suit. We have gone after it. We have sought to bring it to an end, and we have have not stopped in that battle or fashioned that battle only in terms of one group or another group of individuals in our society. We have addressed all individuals and feel very strongly that the constitutional law says that every single individual in this country is entitled to the full measure of protection under our civil rights laws; and we are not going to tolerate an application of civil rights laws that is only oriented to one group or another group of individuals in this country. They all have the same rights. We are all a minority of one, and those civil rights belong to all of us; and I think it is a commitment that we have in that regard. It is more aptly demonstrated by the record we have filed in the past 4 years.

Chairman HATCH. Senator Biden.

Senator BIDEN. Thank you.

Mr. Reynolds, there is discrimination in this country, isn't there?

Mr. REYNOLDS. I think there is discrimination, Senator. I think there is a large amount and more subtle discrimination today than there was in the past. To try to find where the most is, I am not sure I can do that.

Senator **Biden**. Do you think the application of the civil rights laws that are on the books now tend to discriminate against white Americans?

Mr. **Reynolds**. I do not think the laws themselves that are on the books tend to discriminate against any Americans. I think that is the strength of the laws, and I believe that they are written to the credit of Congress in a way that does not indeed prefer anybody on the basis of race, favoring or disfavoring on the basis of race; but indeed are written in a race neutral manner.

Senator **Biden**. Do you think heretofore, though, they have been applied in a way other than race neutral?

Mr. **Reynolds**. I think there is certainly a time when the laws have been applied in a race-neutral fashion that has worked to the disadvantage of minorities and upon occasion in favor of minorities.

Senator **Biden**. Why do you think that black Americans seem to think that this administration is not doing all it can to root out and deal with discrimination? It is just a perception. Obviously, the perception is different from the reality, according to you. Why do you think that is? Do you think you are not making your case, your success story well known enough, or why do you think that is?

Mr. **Reynolds**. Senator, I am not sure that I have the answer for that or am in the best position to answer it. My own view is that by and large those matters that are reported to the public that come out of the Civil Rights Division are the ones that tend to generate the most controversy. Therefore, an awful lot of enforcement activity has gone into the division for the last 4 years yet never sees the light of day; nobody ever hears about it. There are 185 lawyers and the same number of staff dedicated to civil rights enforcement, day in and day out, that are enforcing these civil rights laws, and doing it in a way that is better than anybody has done it before. That is not news controversy, and that does not get out.

What we do hear are the few select controversial cases that make headlines and I think they tend to shape perceptions and I think that is why you get the attitude among a number of people with regard to, for example, our employment discrimination activity, that we have not done anything on behalf of minorities; but we have only sought to advance the interests of non-minorities, or white male employees; when, in fact the case is, that all but 2 cases, some 52 of the cases that we have brought in that area have been on behalf of minorities and women, and only two have involved reverse discrimination. But those two get headlines. The filing of amicus briefs get headlines and I think that what we see generally are that perceptions are shaped by the few controversial cases that are picked up by the media and reach the public, and of all the rest that goes on, people are unaware.

Senator **Biden**. Off the top of your head, can you name for me a controversial case where you came down on the side of black Americans, a very controversial one, not one that was cut and dried, controversial and close-called, like the *Louisiana* case?

Mr. **Reynolds**. I would say the *Memphis Firefighter* case.

Chairman **Hatch**. Now, I will repeat again, all I ask is that everybody be treated with respect, regardless of which point of view they have. We have a man who is an Assistant Attorney General of the United States of America here, who has fought the battle the way he sees it. Nobody has accused him of insincerity. He is an honest, decent man of integrity with a great deal of ability. I do not see any reason to demean him. There are many points of view in that area and any one of us can be wrong in our points of view.

So let us show respect and that is all I ask as Chairman of this particular hearing today.

Senator **Biden**. The *Memphis* case?

Mr. **Reynolds**. Senator, I believe that case, which is highly controversial, is one that stands for the proposition that there shall not be discrimination on account of race with regard to employment opportunities in this country; that we cannot select people or positions in employment based on the characteristics of skin color, or gender, but we have to proceed on a nondiscriminatory basis, and you cannot disfavor or favor individuals by reason of their race.

To me, that is a very positive civil rights statement and one that I think is extremely important.

Senator **Biden**. Let me put it another way.

I undersand your rationale.

Are there any close controversial cases where the result was that the civil rights groups were happy with your decision? Let's put it that way. Even though they might be wrong, they were happy. Name me a close call where those folks thought, "doggone that Bradford Reynolds, he got it right this time."

Mr. **Reynolds**. Certainly, I would think they would be happy with the case of the *Federal Reserve Bank of Richmond,* where we went in and argued very strongly for minorities who pursue individual claims to the point of discrimination, notwithstanding the fact that the Court had thrown out a case against the employer that had indeed put in place a principle that was important that allows people to maintain their actions when they have been individually wronged. That is a case we went into, and advanced a cause under title VII, for women to be considered in an equal way in a welfare partnership and that is certainly a case which individual rights activists should be happy with.

Conrail was one where we went in and advanced the case of the handicapped community with regard to employment discrimination and opened up section 504 employment provision in a broad way and is one that I think the civil rights groups ought to be very happy with.

I would say the *North Havens* case, involving title IX, where we also took the same position in the employment aspect of it is one that I would assume the civil rights groups would be very happy with. Havens Realty, where we opened up standing of testers in title VIII housing discrimination cases, where we went in in the face of opposition of most of the courts, and where the Supreme Court accepted our argument, is another one that I would say the civil rights groups ought to be extremely happy with.

Chairman **Hatch**. Do you know Jeris Leonard?

Mr. **Reynolds**. I certainly do. He was a predecessor of mine, a former Assistant Attorney General.

Chairman **Hatch**. We will recess until we can get back from this vote, and then we will continue with Senator Biden.

[Recess.]

Chairman **Hatch**. We will convene the committee, and we will return to Senator Biden.

Senator **Biden**. Thank you, Mr. Chairman.

Chapter XII, when we last visited, Jeris Leonard. Is it your view that Mr. Leonard understands the Voting Rights Act pretty well?

Mr. **Reynolds**. I think he does; yes, sir.

Senator **Biden**. Is it your view that he is qualified to testify as an expert witness in the voting rights case of *Majòr* v. *Treen*? Is he qualified as an expert witness, in your view?

Mr. **Reynolds**. I do not know, because I do not know what he would be testifying to. If you mean as an expert witness with regard to the line drawing that was involved in that situation, and so on, I would not want to say no, he was not qualified; but he certainly has a full understanding of the law, and he was in the Department as the Assistant Attorney General, and I think he knows section 5 extraordinarily well.

I think he could be qualified as an expert on that.

Senator **Biden**. The State of Louisiana, under the Governor succeeding Governor Treen, is taking the position that civil rights lawyers in *Major* v. *Treen*, having won, should get very limited attorneys' fees from the State because it was such an easy case for them to prove, and Mr. Leonard has been retained as an expert witness for the State and I would like to quote from some of the recent testimony. He said, "I think it is fair to characterize what the legislature did, what the State did, as its official act, the legislature, working in concert with the Government as being one of the most egregious and blatant racial gerrymandering that I have seen, and I think it is fair to characterize it as falling into the category of the only two cases that I can think of where legislative bodies intentionally, overtly intentionally went out of its way to disenfranchise black voters."

"Now, what happened out of that basement room on November 10, or 11, 1981, was that the legislature, or at least that committee and subsequently the legislature, abandoned the entire principle of the creation of black majority districting in spite of the fact that they had directed their staff to create such a district previously, in spite of the fact that both Houses have adopted a black majority district. And then under the threat of veto from the Governor for what may have, to him, seemed to be well intentioned reasons, but which were clearly unconstitutional reasons, the legislature backed off and went back creating two districts, neither of which had a black population majority."

"Now, to use the sportsman's vernacular, is a duck, because it walks like a duck and it quacks like a duck, it flies like a duck. In this case, it even looks like a duck. It was referred to as a duck or the duck bill district."

"Now, Your Honor, that is blatant gerrymander. You don't have to have been involved in too many voting rights cases to know that that's not a smoking gun; that's a smoking cannon."

I assume you do not agree with Mr. Leonard.

Mr. **Reynolds**. Senator, as I have indicated, my analysis of that redistricting was one where that I came to the conclusion that it was not put in place or devised by reason of racial purposes or retrogression in that situation, and, therefore——

Senator **Biden**. It was done for political reasons?

Mr. **Reynolds**. That was the conclusion I reached, and I believe that the district court, which decided the case under a section 2 theory, which was the other standard under the statute also, if I can point you to page 355 of the opinion, the district court also made the point that defendant's showing political motivations were——

Senator **Biden**. Second paragraph.

Mr. **Reynolds** [continuing]. We were the primary impetus behind the configuration of the first and second district's did not provide pervasive rebuttable evidence of nondilution–as I say, had we had the section 2 provision available to us at the time of the Louisiana redistricting it might well have been that it would have come out differently; but Congress had not passed that particular provision then, and that was the one that the Court was looking at.

My analysis of it as a careful review as I could undertake, it was indeed political gerrymandering that was involved, and that the actions that were taken were ones that were taken were ones that were driven by politics rather than race.

Senator **Biden**. Now, having said that, assuming section 2 were in effect, would you have changed your judgment? Would you have ruled the same way the Court did, do you think? Would you have decided the same way the Court did?

Mr. **Reynolds**. I believe that if the evidence had been put before me that was before the Court, that I probably would have ruled the same way on the section 2 analysis in the Louisiana case.

Senator **Biden**. That is interesting. For the record, explain to us why the distinction between the standard in section 5 and section 2 was the Court may have——

Mr. **Reynolds**. The section 5 standard is one that is two-pronged. It deals with discriminatory purposes, as we discussed, and the discriminatory effect text has been defined by the Supreme Court in a case that Senator Hatch referred to earlier as the *Beer* decision as one that looks to the retrogressive aspects of the change, and so what you do is you compare the redistricting plan that has been submitted to the particular districting configuration in place at the time of the change to see if indeed that caused any retrogression in the position of the minority voters by reason of a change. Section 2, which Congress passed, actually, I think in July, on July 23, of 1982, which was shortly after this decision went down, was made by us.

Section 2 looks to discriminatory results and what the Congress says was that you evaluate a host of criteria to determine whether they had the result of discriminating against the black electorate in a particular jurisdiction; and in those circumstances, if you can find that it has a discriminatory result, looking at the factors that the district court did indeed examine, then you find it was a violation of the statute even if it was not purposeful or retrogressive.

Senator **Biden**. Which was the higher standard?

Mr. **Reynolds**. Higher in what sense, Senator?

Senator **Biden**. More difficult to prove.

Mr. **Reynolds**. In the abstract?

Senator **Biden**. Yes; is it harder to make a case under section 5 or section 2?

Mr. **Reynolds**. Well, it depends. If you have retrogression, it is a lot easier to make it under section 5 than it is under section 2. If you have a situation where you have your benchmark and compare it to the new change, and you can show there has been some dilution of the vote, then I think that is an easier case.

Under the prong of the intent standard, I think that it probably is a little more difficult to show the intent, although the court in *Rogers* v. *Lodge* has said that you accumulate the same factors that the Court went through here and you can draw an influence of an intent as a result of those factors, I think it says that is a little bit higher standard than the results test.

Senator **Biden**. When did you make your decision to sign off?

Mr. **Reynolds**. I decided on the *Louisiana* case on June 18, I believe.

Senator **Biden**. June 18, 1982. And discrimination results, section 2, became law in July 1982?

Mr **Reynolds**. I believe that is the correct date.

Senator **Biden**. Now, when was your decision communicated to the State of Louisiana?

Mr. **Reynolds**. June 18, 1982.

Senator **Biden**. June 18.

Mr. **Reynolds**. And a letter to the Governor of Louisiana, and I believe that letter was made public the same day.

Senator **Biden**. You obviously met with the Governor a couple of times and talked to him a couple of times; is that correct?

Mr. **Reynolds**. I did.

Senator **Biden**. And you say you met with the opponents, or those who opposed what I will refer to as the basement plan. Who were those people with whom you met who were opposed who were arguing with you that you should not sign off?

Mr. **Reynolds**. I do not remember the names of them. I know that there were different representatives of the—some in the civil rights community, some members of the—I believe some of the members of the legislature down in Louisiana. I know that we had a couple of meetings with people who came up to talk to us about it.

Senator **Biden**. And you feel that you in fact investigated this matter sufficiently and pursued the opposition's concerns as vigorously as you pursued the concerns of the Governor?

Mr. **Reynolds**. Oh, absolutely. In fact, the real concern here, on, I think, everybody's part, as I tried to indicate, Senator, was whether the Governor indeed had operated with racial motives and, therefore, part of my meetings with the Governor and conversation with the Governor was to probe very carefully what his motives were and what indeed had been his involvement in this. I think that we certainly did probe it extensively.

Senator **Biden**. One of the reasons why this sort of an air or cloud, at least in the minds of some about this situation was it is alleged by some of your critics that when your staff was studying this matter early in 1982, they sent a letter to the State asking for additional information, including information about statements allegedly attributed to Governor Treen, and it goes on to suggest that after you were made aware of this, you canceled the letter and ordered a new one sent. You did not ask about the Governor's statement.

Is there any truth to this?

Mr. **Reynolds**. That is exactly what did happen, and, indeed, that was done with the concurrence of my deputy and also the chief of the section. The letter that went out originally was one that I thought in tone more than in substance, was not the proper kind of a letter for us to be addressing to a Governor of a State. The drafted letter, the one that we recut that we sent out was one that I really think more than anything else addressed the tone of it, and the substance of the letters were largely identical.

Senator **Biden**. Let me just read the part that I was told the part that was deleted.

> According to information we have gathered to date, it has been reported that Governor Trene stated that, "Carving out a mostly black Congressional District may serve the interests of various politicians but it does not serve the interests of black people. Black voters are better served by forming a major part of the population of two districts than the dominant part of one, and with respect to the plan adopted by both Houses of legislature, any bill in that form is unacceptable and without question will be vetoed."
>
> Please indicate whether or not the governor is accurately quoted and, if so, please answer the following: (a) with respect to the first statement submit all information relied upon by the governor as the basis for his statement, including all statements of persons in the black community who were in agreement with the governor's statement. Provide the name, address and telephone number and organizational affiliation of the representatives of black community making such statements.

Now, what did you find offensive in tone?

Mr. **Reynolds**. I don't have the two letters before me and I know that part of the information that——

Senator **Biden**. Let me get you copies—just take down those letters.

While he is doing that, do you consider yourself—well, I will just wait until you have the letter.

Senator **Hatch**. Your time is up. Go ahead and finish this line.

Mr. **Reynolds**. Actually, my recollection, Senator, is that this change was made, now that I see the other one, because it was much more pinpointed than we wanted it to be with regard to the information we wanted to get as to the Governor's views on this matter, and so we recrafted the No. 10 which is the question you read so as to make it a broader question that would allow for us to get all the information and not to permit the jurisdiction simply to answer in terms of a pinpointed response dealing with specific quotes, but rather required them to answer a question that would necessarily incorporate and include that information as well as some other information that they might have that we could not have known about or might not have known about.

So, my recollection is when we visited that and, indeed, I think it may have been something that was recrafted by my deputy, but we did it in order to assure that the question was broad enough not only to insure the particular quotes that were in the letter but also to pick up any other information that we might not know about, any other quotes or any other similar statements that we might not know about but that we should be asking information on and getting information on, and it was for that reason that it was crafted the way that it was drawn.

Senator **Biden**. But rather than trying to spare the Governor having to answer delicate questions, you were, in fact, trying to broaden the scope of your inquiry. Broaden the scope of your inquiry?

Mr. **Reynolds**. I think the Governor was called upon to answer the delicate questions in full measure and did so and submitted information to us on those points and came in and talked to me and my staff with regard to those questions and was asked by me and my staff on those quotes, about those quotes.

Senator **Biden**. My time for this round is up, and I thank the Chairman for letting me go over. I will be back.

Senator **Hatch**. Thank you, Senator Biden. I will reserve my time and I will use after I recognize Senator Metzenbaum.

Senator **Metzenbaum**. I thank the Chairman.

Mr. Reynolds, I want to ask you about a request by the city of Petersburg, VA, for a request to change approve a change in city council districts.

As I understand it, the city submitted an initial plan and your staff recommended objecting to it and you agreed with your staff and objected. Then a new plan was filed. Your staff recommended objecting to this plan as well, but you decided to clear it.

Now your staff found that the new plan would reduce the percentage of black voters in six of the seven districts, and in three of them the effects were significant.

The staff also found that both black and white city councilmen agreed that these changes would hurt the chance for blacks to elect representatives.

Furthermore, the mayor stated that he wanted to reduce the black percentages that were then current because they produced safe black districts.

Furthermore, your staff pointed out that during the debate over reapportionment of the first plan, the mayor said, "If blacks rule the city, we will have a black city, a welfare city. Blacks are more interested in hiring blacks than in hiring good teachers. They will raise taxes, increase welfare, put up public swimming pools."

Then your staff points out the mayor in later statements repeated his characterization of the black population as parasitic and complained that the whites had moved out and the blacks had stayed.

In addition to the staff lawyers, the head of the voting section wrote to you and said, "I agree that we should object to this latest reapportionment effort of the city of Petersburg. As with the initial plan to which we previously objected, the plan is also retrogressive in its treatment of black voting strength in Petersburg and, like the first one, seems frought with invidious purposes.

How in the face of all this did you decide to approve the plan?

Mr. **Reynolds**. Senator, the plan that was resubmitted to us was one where they redrew the lines in a way that afforded black majorities 65 percent in 4 of the 7 districts in a community that was, I think, 56 percent voting age population. The redrawing of those districts was done after we had put in an objection. I felt on a full examination of that that the plan that they had come up with which afforded blacks majority districts of 65 percent or better in 4 of the 7 was an appropriate response to our initial objection, and it is for that reason that I withdrew it.

Senator **Metzenbaum**. You know, it is a funny thing about your record and I have been listening to some of the other questions as well as the facts we have before us from our staffs. I can't find any instance in which you didn't go against the blacks. Normally people in positions of responsibility work through our staff. If the whole staff thinks we are wrong, we normally hesitate.

In this case, your whole staff, the staff lawyers are on the side of the issue different than yours. The head of the voting section wrote to you. He was against your position. Even your assistant, Mr. Turner, recommended objecting to the plan. He seemed pretty reluctant. He wrote:

> "Brad, I guess we have to object, for if the mayor kept still, we probably would not. The picture seems clear that everyone in town thinks the three percent or four percent difference in Districts one and four is worth fighting for and will make a big difference in outcome. I really doubt it and think blacks could probably win if they got out and worked. Still the mayor and the whites have insisted on pairing those districts back for no reason other than the avoidance of safe black districts, and that is its purpose even if they ultimately find the blacks were, in fact, able to win."

Now, certainly everybody on your team thinks that you shouldn't go one way and you go that way. I have not seen any instance in which that is the case when it is Brad Reynolds speaking out for the blacks. We could get the feeling that something may be bigoted about you, that maybe you don't want blacks, that maybe you don't want them to have an equal share in our society. I have been looking over the record. I don't think since I have been here in the Senate I have seen so many instances in which one man was involved on the wrong side, as I see it, and certainly on the wrong side as far as the general consensus is concerned vis-a-vis a fairness to blacks. You have the *Major* v. *Treen* case in Louisiana and there you have the Governor telling a newspaper reporter during the consideration of the plan that a black district would be racist and ominous. The chairman of the House Reapportionment Committee said he opposed the original plan that created a greater black majority district because, as was previously thought out: "We would already have a nigger mayor in New Orleans, and we don't need another nigger bigshot," And then, in the *Petersburg* case, the mayor said: "If blacks rule the city, we will have a black city, a welfare city. Blacks are more interested in hiring blacks than in hiring good teachers. They will raise taxes, increase welfare and put up public swimming pools."

And the mayor also says, the black population is "parasitic."

Then you even have the *DeAgostino* case, which we haven't gotten into yet, but we will, in which one of your staffers says: "Blacks, because of their family, cultural and economic background are more disruptive in the classroom on the average."

In every single instance—every single instance, the head of the Civil Rights Division winds up on the wrong side of the issue, and if you are black, you have to hate him for it because he just doesn't seem to have any balance.

My question to you is, how can any black person in this country, or any person who thinks that blacks are entitled to equal right, or fair shake, how can they look upon Brad Reynolds and think, "He will be on our side."

One of the cases I remember, you wouldn't even let the NAACP intervene in a case. Every time there is an issue, Brad Reynolds stands there and says, "I'm white," and turns his back on the blacks.

And you want to be Assistant Attorney General, and I have to say, what message will we be sending to the blacks of this country, the fair-minded citizens of this country, if we confirm you?

You are welcome to respond in any way you want, or not at all.

Mr. REYNOLDS. Senator, let me try to respond to what I believe was the question there.

We have acted, I think, in the voting right area on, as I said before, something like 50,000 changes. I have entered, I think, around 266 objections with regard to the redistricting activity that went on in response to the 1980 census. We were instrumental in the division on behalf of minority communities to insure that all of the redistrictings that were put in place throughout the south and throughout the covered jurisdictions were done in a way that was fully advantageous and extremely advantageous to the black population and black voting rights and, indeed, I think that that record and that history under this 4 years is unparalleled and second to none.

We have heard today, I think, a select few, I believe it is three now that I have heard that have been raised, matters where there has been a disagreement with me and my staff, and in those three it was certainly the case that I came down on the other side of these issues than my staff did. These are very tough calls to make. They are not easy. I don't pretend they are easy. I struggle with them. I try to do the best I can.

Certainly in the *Petersburg* case, which was one that I did object to, the staff agreed we ought to object, and then it was redone. What they did when they redrew that district was to put in place a redistricting where 4 of the districts, 4 of 7, had over 65 percent black majority in the jurisdiction that had a 56 percent voting-age population.

My view was when that redistricting was redone in that way that it, indeed, was responsive to the black community. It did not demonstrate a retrogression or a dilution of the vote, and it has proved in Petersburg to be effective in terms of blacks being able to win in the elections down there.

Senator METZENBAUM. Did this leadership or the black community or the blacks generally approve of your decision which I gather went contrary to what their inclinations were, and contrary to your staff?

Mr. REYNOLDS. In the Petersburg situation, I don't have a recollection right now what the view was. I suspect the memorandum you are referring to would indicate they may well have opposed it although at the time that they came back with a redrawn district after an objection, there was a struggle, I think, on the part of both the black and white community to come to an agreement. It is not nearly as clear that the opposition is all on one side or all on the other in those circumstances.

The only other point I guess I would like to make, Senator, is that you mentioned I opposed an intervention in, I believe, a South Carolina school case. In fact I didn't oppose any intervention in that case. We invited them to intervene and cooperate in the intervention. What we did say at the time of the request for intervention, which was at the very time when there were delicate negotiations for settlement going on and it was premature at that time for intervention to occur, was that if settlement discussions broke down that we would, indeed, invite intervention of the NAACP Legal Defense Fund to participate in that case. If settlement discussions were, indeed, successful and there was a consent decree that we would invite the NAACP Legal Defense Fund to speak to the settlement and to make its views known to the court. Settlement discussions did break down, and the intervention was allowed and, indeed, was allowed with our agreement and acquiesence in that, and at no time did we oppose that intervention of that group.

So, I think that what we have are a couple of instances that people have focused on which really disregard the extraordinary record that has been made by the division, the extraordinary commitment that we have had to civil rights enforcement activity in this country, to enforcing these laws in full measure, and to insuring that discrimination is removed from every quarter where certainly we can find it as rapidly and as effectively as we can do it.

Senator **Metzenbaum**. I guess my point is even in that case where there is the question of whether you were on the side of the intervenor or not, you are actually saying let them intervene after we have worked out the settlement negotiations, and if we have something that we have agreed upon, then let them come in and comment. That is not quite the same because, as a practicing lawyer, you know that is not the same kind of equality of opportunity to participate in the effort.

But even in that matter, you have two staff attorneys, one at the time of resignation, one without any resignation being quoted as saying something to the effect, and I think you have denied it, but we have two people on the opposite side, and I don't know whether you did or didn't, something like make the bastards jump through hoops, or something like that.

Mr. **Reynolds**. I never made that statement.

Senator **Metzenbaum**. That may not be the right quote, but it is along that line I guess, because it has been used previously.

What bothers me is I could understand Brad Reynolds standing up against the black community or standing up in his decision that the black community was not happy about, once, twice, three times. But every time we look into one of these highly controversial cases, you are on the wrong side, as I see it. I don't know of any instances in which Brad Reynolds is out there as the defender of civil rights. You tell me about 20,000 or 50,000 cases. I can't comment on those because they are figures to me. These are cases. These are human beings. These are Petersburg, VA; these are Selma AL; these are somewhere in North or South Carolina. These are Louisiana. but these are actual litigated cases. Fifty other employment discrimination cases, you want to reopen. Whites and blacks alike are saying to you, "Lay off, go mind your own business."

You are insisting upon getting in. What makes you tick? Where do you come from on these kinds of things? How come we never find you, head of the Civil Rights Division, riding your white or black or pink horse down the road and championing civil rights of people and getting some attention for that, but we only find Brad Reynolds really, in a way, and I am not saying you are but it makes it appear that you are bigoted and not fair to blacks, and that bothers me. It would bother you if you were sitting here.

Senator HATCH. Thank you, Senator Metzenbaum.

Let me ask you a few questions at this point.

Senator Metzenbaum has stated and suggested your division "never" comes down on the side of the civil rights community. I believe that to be inaccurate and you indicated today it is inaccurate. Let me again refresh all of your memories on just a few cases I think unfortunately he has overlooked.

Could you briefly summarize the substance of each of these Supreme Court decisions. You can only give a few seconds or half a minute to each one, but whatever you would like to say and on the role of the Civil Rights Division in these particular cases. What about the *Grove City* case, part 1?

Mr. REYNOLDS. In part one of the *Grove City* case, the Civil Rights Division came down on the side of saying that Federal loans to students were sufficient to draw the conclusion that the institution itself received Federal financial assistance. I think that opened wide a new door in the title IX enforcement area with regard to sex discrimination in the civil rights community by allowing indirect funding to be sufficient financial assistance to attach the statute's command.

Senator HATCH. It is well known the civil rights community was not very happy with part 2 of *Grove City*, but it is also well known that the statute clearly talks in terms of programs and activities. Am I correct in that?

Mr. REYNOLDS. I believe that is correct and the Supreme Court has so ruled.

Senator HATCH. They were pleased with you on one part of the decision but not on the other, but you felt the Supreme Court adopted the point of view you said. In fact there is no question that it did.

Mr. REYNOLDS. That is correct, Senator.

Senator HATCH. What about the *Hishon* case? Tell us a little bit about that.

Mr. REYNOLDS. *Hishon* was a case where the Civil Rights Division came in and argued in the Supreme Court Title VII, an employment discrimination statute, that title VII required law firms to consider women as well as men for partnership positions and that law firms were not excluded from coverage under title VII. We were successful in that case and I think that was a tremendous success for the civil rights community.

Senator HATCH. Did the civil rights community like that case?

Mr. REYNOLDS. I understand it was very favorably received.

Senator HATCH. That is my understanding.

Senator **Metzenbaum**. Those were women's cases? Is that right, Mr. Chairman?

Senator **Hatch**. Well, women should have rights, too. There is no question.

The civil rights community has been behind this particular case. Is that right?

Mr. **Reynolds**. That is correct.

Senator **Hatch**. That is my understanding.

How about *Plyler* v. *Doe?*

Mr. **Reynolds**. In *Plyler* v. *Doe,* we participated to the extent saying that aliens were, indeed, citizens and entitled to the protection of the equal protection clause and the Supreme Court did agree with that ruling so that alien rights could be asserted.

Senator **Hatch**. Did the civil rights community support that result?

Mr. **Reynolds**. I believe that that was certainly an argument that they made.

Senator **Hatch**. That is my understanding.

What about the *North Haven* case you mentioned earlier?

Mr. **Reynolds**. In North Haven, we argued that under title IX again of the Education Amendments Act that employment, the right to be free from discrimination in employment, to be free from sex discrimination in employment, reached the whole funded program, whatever the purpose was of the funding, that it did not just attach to employment if the primary purpose of the funding was employment. That was an expansive view of the law when we argued in the Court, and the Solicitor General made the oral argument that prompted the Court to, indeed, speak to that in its decision, and I think that was one the civil rights community was very pleased with.

Senator **Hatch**. Do you feel confident that the civil rights community was pleased with that rather resounding case?

Mr. **Reynolds**. I believe they were.

Senator **Hatch**. That is kind of a landmark case as well, is it not?

Mr. **Reynolds**. I think that is a landmark case.

Senator **Hatch**. What about Havens Realty?

Mr. **Reynolds**. *Havens Realty* is a case where we argued in support of standing for testers who are individuals and who have not themselves been discriminated against but have been sent out into the housing market to knock on doors to determine whether or not the lessor or the owner of the establishment would turn them away by reason of race.

That testers can maintain title VIII lawsuits gave those individuals standing which was really a very significant expansion of the title VIII coverage, and I think it was something that the civil rights community was exceedingly pleased with.

Senator **Hatch**. You believe they were pleased with that case as well?

Mr. **Reynolds**. Certainly.

Senator **Hatch**. What about the *Sumatomo* case?

Mr. **Reynolds**. I am drawing a blank.

Senator **Biden**. It sounds like a law school exam. You are doing well so far.

Senator **Hatch**. That was discrimination against Japanese people?

Mr. **Reynolds**. It had to do, I think, with the employment of foreign nationals in corporations here in the United States and whether or not a treaty provision was in place that would allow the employer to employ only the foreign nationals, whether that came in conflict with title VII, and I believe the court resolved that in terms of saying title VII controlled in the absence of an express treaty provision.

Senator **Hatch**. That was a case of ethnic discrimination. Is that right?

Mr. **Reynolds**. That is correct.

Senator **Hatch**. Do you feel the civil rights community was happy with the result in that case?

Mr. **Reynolds**. I do. Certainly the case was one that gave recognition to title VII authority in those instance where it did not directly come in conflict with a treaty provision.

Senator **Hatch**. What about the *Hathorne* case?

I have to admit I am amazed that you remember all of them, but I just thought these are some of the cases that are very important, I think.

Mr. **Reynolds**. *Hathorne* was a voting rights case where the Supreme Court said that under section 5 certain changes had to be submitted for preclearance, and those changes could not be implemented until such time as preclearance had taken place. It was a case where the jurisdiction was trying to implement a voting change before it had been precleared, and the Supreme Court said that implementation cannot take place prior to the preclearance by the Attorney General.

Senator **Hatch**. What do you believe the attitude of the civil rights community was toward that?

Mr. **Reynolds**. They were very pleased with that.

Senator **Hatch**. What about the *Hendrich Hudson Distributors* v. *Raleigh* case? That was the one about the right of deaf students to have an interpreter.

Mr. **Reynolds**. In Raleigh, we argued to the Supreme Court that the students under the Education Handicap Act should indeed have an interpreter and that the statute did, indeed, allow that kind of accommodation for the individual. The court ruled against us in that case and said that the Education for Handicapped Children Act did not, indeed, require that kind of an accommodation.

Senator **Hatch**. Do you feel the position you took was supported by the civil rights community?

Mr. **Reynolds**. Our position was supported. The Court disagreed with that.

Senator **Hatch**. Even though you lost.

Mr. **Reynolds**. We lost.

Senator **Hatch**. How about the *American Tobacco Co.* case? Do you remember that one? That related to the adoption of a seniority plan perpetuating the efforts of employment discrimination—the effects of employment discrimination.

Mr. **Reynolds**. I think that that case, which did involve seniorities, was one where the court said, I believe it was— well, I am not sure. I think it had to do with cutting off the rights of people, seniority rights, and the court said you couldn't do it, but I am drawing a blank on that.

Senator **Hatch**. I could go on and on. I think the purpose of asking you these questions is because, you know, some of the questions you get from committee members, I think, are a little misleading, or at least some of the statements that are made here.

I think there have been a lot of things that the civil rights community is pleased with and there are a lot of things they are not pleased with. There really are a diversity of points of views in these very difficult, complex areas. But there is no question that you have a proud record on the question of civil rights, it seems to me.

I could go on and on, but I understand you need to finish in a relatively short time and Senator Kennedy has about 10 minutes left of his questions, so he would like to be able to proceed, so I will just turn to Senator Kennedy and let it go at that. We could go on and on about cases that I think the civil rights community would be happy with and has been happy with.

Senator **Kennedy**. Thank you very much, Mr. Chairman.

I believe Mr. Reynolds can probably reach back in spite of all of the other intervening questions to where we were this morning, and I would like to follow up on some of the issues that were raised during the course of the morning. I regret I was not here for the responses to some of our colleagues' questions, but I had to be on the floor for an amendment. So I apologize to the witness, but I will look forward to reviewing the record.

The issue which I was very much interested in earlier, Mr. Reynolds, was the series of instances where you overrode staff recommendations. I mentioned two of the instances this morning, and there have been others that have been raised during the course of the hearing during this afternoon.

I understand that in response to questions by other Senators, you have stated that very often when you disagree with your staff recommendations, you meet with them to discuss their recommendations, and you stated on a number of occasions that sometimes the staff turns around and agrees with you at these meetings.

I understand you conducted such meetings with reference to the staff recommendations that the United States intervene in several of the voting rights cases in Mississippi. We had talked earlier today about the Selma voting place and also about Bob Jones.

As I indicated, my concern is this general area of overruling the staff, and I direct your attention to these cases, the voting rights cases in Mississippi.

Did you memorialize those meetings in any notes or any memos?

Mr. **Reynolds**. No, I did not, Senator.

Senator **Kennedy**. I read earlier today on the *Selma* case where you actually had written some comments at the end of the memo. Do you know if you put your decisions or your reactions to any of the staff recommendations in writing in any of the Mississippi voting rights cases?

Mr. **Reynolds**. Well, with respect to all section 5 decisions that I pass on, Senator, there is a memo to the file that I prepare and is put in the file.

Senator **Kennedy**. What I am talking about now is the intervention of the Justice Department in voting rights cases, the proposed Mississippi lawsuits.

Mr. **Reynolds**. I am not sure I understand what we are talking about.

Senator **Kennedy**. As I understand, there were a series of staff recommendations for the participation of the Justice Department in various voting rights cases in Mississippi, and you had meetings with the staff and, as a result of those meetings, as I understand, the staff turned around and the decisions were made for nonintervention. I am just wondering whether at any time you wrote anything down on your own position, the reasons for it, and the reasons why you believed the staff turned around and reversed their position.

Mr. **Reynolds**. Well, Senator, actually I believe you are speaking of the 10 Mississippi cases that involved questions of whether elections could go forward in the face of objections that had been entered by the Department of Justice. The staff had recommended we go into those cases. I had talked to the private counsel. I had also talked to the members of my staff who had made that had made that recommendation. After talking to private counsel, and it was the consensus of all of us after those conversations that the courts were, indeed, going to enjoin those elections from going forward; that the matters were on track and in court, and that it really would be counterproductive at that juncture for us to get into the case.

I think that the only writing that addresses that is contained in certain responses that I had made to the accusation on prior occasions by some that the reason we didn't go into those ten cases was for purposes of disagreeing with the position that the staff wanted to assert, and I gave in response to that accusation I gave the same answer I have given you today and that is written in certain places where we have issued responses to the accusations.

Senator **Kennedy**. As I understand there were 10 different cases where the professional staff had made recommendations to move ahead. Then, as I understand, they reversed their positions, and I understand further there is at least no written record for the reason for the change in their position.

Do I understand it correctly?

Mr. **Reynolds**. I think that's—if you mean a memo in the files, that is correct.

Senator **Kennedy**. Would the answer be yes with regard to changing the polling place in Selma. You wrote 8 or 10 lines on the bottom of the memorandum. Was there any other written reaction or response?

Mr. **Reynolds**. Senator, the answer is "no." That occurred, and there was a quick turnaround and I think that everybody agreed that is the way we should handle it and, therefore, there was no memorialization in the file on that.

Senator **Kennedy**. In these cases, your staff had a different position going in than they did coming out, and you were obviously persuasive to them. We don't have any real way of knowing whether they considered the other arguments which you raised here, and whether that ultimately persuaded them or not to reverse the staff recommendations on the voting rights cases.

Are you prepared to indicate that in the future that you would keep a record in matters which come before you in which there is a staff recommendation which is contrary to your view?

Mr. REYNOLDS. Senator, generally, I think we do memorialize decisions. There are a lot of decisions that occur during a day and sometimes it is not always possible to make a memo to the files of every decision that is entered into or arrived at, but my custom is generally to memorialize my reasons for doing things in making a decision.

Senator KENNEDY. Voting rights issues and questions, I would think, would have a very special standing in terms of any judgments that would be made. I don't think we would really characterize those as being the run-of-the-mill kinds of decisions that would be coming before the Department. It is obvious they are going to affect some rather basic and fundamental rights of people, and I just think, again, where we have a series of instances where the professional staff is being overridden that there ought to be a written record of whether the staff changed their position, and if so, why.

You have suggested in our earlier exchange today, and I understand again in response to some other Senators' questions that you personally supplemented the investigations done by your staff. Is that correct?

Mr. REYNOLDS. I am not sure what you mean by personally supplemented. I undertook——

Senator KENNEDY. You got other information on some of these matters.

Mr. REYNOLDS. Generally, the other information would be information my staff was asked to obtain for me and was involved in for the most part. There were instances where there were telephone conversations that I had that I reported to the staff on.

Senator KENNEDY. Is there any other written information on these matters whether it is the *Selma* case or *Bob Jones* with regard to the *Mississippi* cases, any other written information or notes of telephone calls that would be of value and that are available now?

Mr. REYNOLDS. Senator, I believe the committee made a request for those documents and we have been very forthcoming in turning them over. I am not aware of other documentation in the files that would bear on those matters.

Senator KENNEDY. If it is not in the file, it didn't happen, to the best of your knowledge?

If we go through these instances and don't find any memoranda, then we would be able to assume you made the judgment based on, upon the recommendations of the staff or your own reactions to those recommendations. Would we be correct in that assumption?

Mr. REYNOLDS. I guess it differs from each case, and I can't categorically at this juncture characterize exactly how each case was developed and determined, but I can say that the request was made for all of my personal memoranda regarding certain of the matters that you have raised and the internal memoranda of my staff, and we have made those available to the committee and to the committee members asking only that the privilege of confidence that attaches to internal deliberative documents be preserved to the fullest extent that the committee is able to do so.

Senator KENNEDY. If I redirect your attention to the *Selma* case, I think I just had one question on the additional information that you had other than the memorandum. Do you remember any other individuals that you talked to or any other groups that you talked or any other groups that made any representation to you, other members of your staff that you considered when you rejected what I would think is a very compelling memoranda from professional staff people on that particular issue?

Mr. REYNOLDS. I don't have a recollection of anything other than what we have provided to the committee.

Senator KENNEDY. I think, Mr. Reynolds, you can understand the importance of the preservation of this material to our ability to try to oversee the Department in judgments that are made and policy decisions that are made on matters on which this committee has spent a great deal of time, whether it is in the voting rights area or other civil rights areas. I would certainly hope that if the nomination moves forward that, given the importance and the significance of these issues affecting civil rights, affecting voting rights, that we would be able to have as a complete a basis for review as we could.

I have one other area I would like to go into, Mr. Chairman. That is the Hissom Memorial.

On October 12, 1983, the Chief, Special Litigation Section, recommended the Justice Department conduct a CRIPA investigation at Hissom Memorial Center in Oklahoma, during a site visit of two other State schools under investigation for constitutional violations and patient care. The State human services official urged the Justice attorneys off the record to investigate Hissom.

The memo from your section chief stated, referring to the State officials, "Although the physical plant at Hissom is certainly in better condition and more attractive than at the Enid State School and the Paul's Valley State School, problems at Hissom in the areas of patient care, rehabilitation services, restraints, collusion practices are more severe."

Then, on November 18, the section chief sent you an update on Hissom describing avoidable drowning death of a resident who was left unattended for 20 minutes, and on November 28, your legislative counsel sent a memo marked important and urgent to your deputy concurring in the section chief's recommendation that the Justice investigate Hissom, and on December 29, you disapproved the investigation, stating that you needed further information.

Then I imagine you are aware that after the decision not to investigate, you were quoted in the Sunday Phoenix and Times Democrat of Muskogee, OK, as follows:

> If I had ten drownings, it would suggest to me I had a big problem there, but if there is just one, we owe it to the institution and the state officials and ourselves to do more digging before deciding to investigate.

What did you mean by that? How many drownings would you have needed or deaths?

Mr. REYNOLDS. Senator, the Hissom situation was one where we were asked under our CRIPA responsibility to look into whether the institution had an egregious and flagrant constitutional or Federal law problems in the conditions of the facility.

Based on the memorandum that came to me, there was serious question whether the facts gathered at that time were the kind that would suggest an investigation. There was nothing in the memorandum or discussion with the staff to suggest that that was a matter that one should be concerned about as a competitive kind of a situation. It was not one that there was anything attributable to anything but a very tragic circumstance in that particular case. Given that it was not something in and of itself which suggested to me we should launch an investigation to look into to overall conditions of the facility.

However, I did say to my staff that there was sufficient reason for concern based on what they presented to me and which also bears on that incident so they should go back and get some more facts and gather some more information and if it did appear to them, based on all additional evidence, that the investigation should be conducted that I would certainly accede to them at that time.

Senator **Kennedy**. Mr. Chairman could I have included in the record the memorandum on this investigation by Mr. Sullivan, whose is legislative counsel, Civil Rights Division, as well as Mr. Peabody, be made a part of the record.

Senator **Hatch**. Subject only to the agreements that we would not put the confidential materials into the record.

Without objection, it will be included.

[Memorandum follows:]

Memorandum

[redacted]

Subject

Recommendation to investigate Hissom Memorial Center

Date

November 28, 1983

To

Charles J. Cooper
Deputy Assistant Attorney General
Civil Rights Division

From

James M. Sullivan
Legislative Counsel
Civil Rights Division

Under CRIPA, an investigation is proper only if there is reasonable cause to believe that the State is subjecting residents to egregious or flagrant conditions that violate the residents' constitutional rights. Such reasonable cause is provided by the allegations in the November 18, 1983 memorandum which states that inadequate staffing caused a recent death and that inadequate staffing constitutes a significant hazard to the lives and safety of Hissom residents. I therefore concur in the recommendation to investigate Hissom Memorial Center.

An investigation could not, however, be justified solely on the basis of the allegations in the October 12, 1983 memorandum. Allegations of inadequate medical care, shelter, and habilitation programming provide a basis for investigation only if they constitute a significant hazard to the lives and safety of Hissom residents. The memorandum states in conclusory fashion that such deficiencies "documented in a recent medicaid survey, raise serious constitutional concerns with respect to the provision of minimally adequate medical care, shelter, and habilitation programming aimed at ensuring safety . . . ." This conclusory statement is an insufficient basis for commencing an investigation. The memorandum should have analyzed each alleged deficiency to show whether or why it was reasonable cause to believe that it constituted an egregious or flagrant condition that violated the residents' constitutional rights. The only alleged deficiencies that clearly might constitute such a condition were (1) the lack of self-feeding, self-toileting, and self-grooming programs; and (2) medication practices.

The memorandum of October 12, also provides inadequate discussion about the allegations of undue physical restraint. The Constitution does not require treatment in the least restrictive environment. Therefore physical restraints in excess of the least restrictive do not necessarily violate the Constitution. Furthermore, restraints imposed because of insufficient staff do not necessarily violate the Constitution. Therefore, these allegations of undue restraint do not constitute reasonable cause to believe that the State is subjecting residents to egregious or flagrant conditions that violate the residents' constitutional rights.

I was forced to conclude that the October 12 memorandum offers insufficient evidence to justify an investigation.

Because the November 18 memorandum does offer sufficient evidence to justify an investigation, I concur in the recommendation to investigate Hissom Memorial Center. At the same time, however, I recommend that the Special Litigation Section reanalyze the allegations in the October 12 memorandum for the purpose of determining whether those allegations constitute an additional basis for the investigation.

November 18, 1983

Update to Proposed S.10 investigation of
Hissom Memorial Center, Sand Springs,
Oklahoma

Mr. Bradford Reynolds
Assistant Attorney General
Civil Rights Division

Arthur C. Peabody, Jr.
Chief
Special Litigation Section

On October 12, 1983, we forwarded to you our proposal to initiate as S.10 investigation of Hissom Memorial Center, Sand Springs, Oklahoma. As we noted in our proposal, state officials confidentially invited us to investigate admitted deficiencies at Hissom. In an effort to speed the process, state officials recently forwared to us proposed corrections that could be adopted as remedies pursuant to a CRIPA consent decree.

In light of the eagerness and continued attention of state officials to the Himmom matter and their interest in simultaneously resolving the issues raised in our May 24, 1983, 49-day letter relating to two other Oklahoma facilities (Enid and Paula Valley State Schools), we believe than an expedited review and approval of our proposed S.10 investigation of Hissom would be welcome by state officials and facilitate a cooperative conclusion to these matters.

Additionally, we recently received from officials of the Department of Health and Human Services (HHS) an incident report documenting a recent death of a Hissom resident who was discovered drowned in a bath tub after being left unattended in the bathroom for over 20 minutes. This death provides further support to the HHS survey findning, cited in our proposed S.10 investigation memorandum, that Hissom suffers staff shortages. As this avoidable death illustrates, Hissom's direct care staff shortages constitutes a significant hazard to the lives and safety of Hissom residents.

Senator **Kennedy**. I have just read through this briefly. Is there some aspect of it that breaches confidentiality?

Mr. **Reynolds**. I am not sure of the memo you have in your hand, Senator, but I do know we did turn over some memoranda.

Senator **Kennedy**. The Sullivan legislative counsel to Charles Cooper, Deputy Assistant Attorney General. It is dated November 28, 1983. It is a page-and-a-half memorandum. Reference is made in this by Mr. Sullivan that the November 18, memorandum "does offer sufficient evidence to justify investigation. I concur in the recommendation to investigate the Hissom Memorial Center". In the Peabody memorandum of November 18, Peabody states that the avoidable death illustrates that Hissom's direct care staff shortage constitutes a significant hazard to the lives and safety of Hissom residents.

Now, these are your staff people making these recommendations. I understand that you were not prepared to accept their recommendations either at this time. Am I correct?

Mr. **Reynolds**. Senator, what I did indicate to him was that I thought that we should gather some more facts on that situation, that I did not think that that one isolated incident should prompt an investigation; if, indeed, there were more facts available that would speak to the overall conditions and the overall staffing problems at the institution, that would be something that we ought to focus on and investigate.

One of the problems we had in Hissom which I believe is reflected in my comments and in the memo was that there was some concern that there was an effort to get the Federal Government to weigh in with a CRIPA investigation with regard to that facility in order to prompt the legislature to do some extensive funding with regard to that facility and other matters in the State. I expresed some reservation that if we didn't have further investigation whether we should allow ourselves to have the CRIPA mechanism geared up in order to prompt the legislatures to expend a mass amount of funds in that regard.

So, my only concern really was not one of a disagreement with the staff over going into the Hissom facility in the event we had full facts to suggest to us a cause for legitimate concern under the statute in question, but only that I felt that we needed to do some more digging, and that I, therefore, asked them to do that.

Senator **Kennedy**. What better way to dig than with an investigation?

Mr. **Reynolds**. Well, I think there is a problem under the CRIPA statute because once you go into a formalized investigation under CRIPA, you have to send the State notice and you have to identify those specific areas that are a cause of concern, and there are an elaborate set of procedures that kick off an investigation which at that point we were rather lean——

Senator **Kennedy**. Didn't Mr. Peabody understand that? Didn't your staff understand that as well?

Mr. **Reynolds**. Certainly the staff understood that, and——

Senator **Kennedy**. They reached a different conclusion on this, too.

Mr. **Reynolds**. They recommended an investigation and I indicated that I thought if we had more information that it would be more appropriate at that point to initiate a formal CRIPA investigation.

Senator KENNEDY. I won't take the time now to go through this, but given the other tragedies that occured at Hissom after the drowning, the acid burns on children, the doctor who treated some children and had never gone to medical school, would your decision still be the same?

Mr. REYNOLDS. I am not sure what you have reference to, Senator.

Senator KENNEDY. There has been a class action against Hissom filed in Federal court. One resident was brought to the hospital comatose near death with a deep acid burn on his face, lying unnoticed in his own vomit.

Another allegation is that children were being treated by a doctor who never went to medical school.

I don't know if you are familiar with any of those, or whether they brought the class action to your attention.

Mr. REYNOLDS. Senator, that is the first I have heard of those cases, and my staff has not informed me of that. As I said, I asked them to go back and gather information, and certainly if that additional information had been brought to my attention, I would have evaluated it very carefully.

Senator KENNEDY. You are not familiar with any of the other cases that were brought before the Federal court on the Hissom Center?

Mr. REYNOLDS. No, I am not. I wasn't even aware that there were other cases brought.

Senator KENNEDY. Thank you, Mr. Chairman.

We have gone beyond the time, and I appreciate the time. I would like to be able to file some other questions for the witness.

Senator HATCH. Without objection, we will keep the record open through tomorrow evening.

Senator KENNEDY. Thank you very much.

Senator HATCH. Thank you, Senator Kennedy.

We will have to recess now until tomorrow morning at 10 o'clock. Let's announce to everybody that we have 54 witnesses who want to testify, and that Senator Thurmond in his characteristic good grace is willing to listen to all 54 of them as are some of the rest of us on both sides of this nomination, but we will begin with Mr. Reynolds first thing in the morning at 10 o'clock. We ask that all witnesses be in attendance at that time, because we don't know how long the further interrogation of Mr. Reynolds will take. We presume it will not take very much more time because we have spent a rather exhausting day today. We know Senator Biden has a few more questions, and there may be one or two others, but we hope that we can finish the questioning of Mr. Reynolds early in the morning and then start moving on to our witnesses. So, we will expect the witnesses to be here and be prepared to go.

With that, we will recess until tomorrow at 10 a.m.

[The committee was recessed at 6:20 p.m., to reconvene at 10 a.m., Wednesday, June 5, 1985.]

NOMINATION OF WILLIAM BRADFORD REYNOLDS TO BE ASSOCIATE ATTORNEY GENERAL OF THE UNITED STATES

WEDNESDAY, JUNE 5, 1985

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee convened, pursuant to notice, at 10:08 a.m., in room SD-226, Dirksen Senate Office Building, Hon. Strom Thurmond (chairman) presiding.

Also present: Senators Biden, Kennedy, Mathias, Simon, Specter, Metzenbaum, and Heflin.

Staff present: Duke Short, chief investigator; Frank Klonoski, investigator; Joe Kopka, investigator; Ruth Lucas, investigative clerk.

The CHAIRMAN. The committee will come to order.

Today, we continue the hearing of William Bradford Reynolds to be Associate Attorney General of the United States.

The distinguished ranking member of the committee, Senator Biden, has a few remaining questions, after which we will turn to the other witnesses, if there are no more questions from any member of the committee.

Mr. Reynolds, before we start, I would just like to remind you that you are still under oath.

Senator Biden?

TESTIMONY OF WILLIAM BRADFORD REYNOLDS, OF MARYLAND, NOMINATED TO BE ASSOCIATE ATTORNEY GENERAL OF THE UNITED STATES

Senator BIDEN. What I would like to do if I may, Mr. Reynolds, is go back and make sure that I understand what we said yesterday about the *Louisiana* case. And again, the reason why I am focusing on that case rather than on all the different cases, and a whole range of other areas, is because I want to make sure I get a pretty good idea of how you approach these things, what your thought process is, because your critics suggest, as you well know, not that you are not intellectually competent to hold the post, not that you are not by background qualified to hold the post, and not that you are unfair, but simply that you are very insensitive to the concerns of minority persons.

Now, first of all, I want to recap. Yesterday, you indicated to me, and your testimony previously has indicated, that you believe that Governor Treen's decision to announce he would veto the Nunez plan was based on a political consideration; it was not racially motivated, but it was politically motivated; is that correct?

Mr. **Reynolds**. That is correct, Senator.

Senator **Biden**. And, since it was politically motivated, it was not anything that would send up any real alarm bells to indicate that maybe preclearance under section 5 should not be granted; is that correct?

Mr. **Reynolds**. No, Senator, that is not correct.

Senator **Biden**. OK.

Mr. **Reynolds**. When the Louisiana redistricting came in, it sent up a lot of alarm bells. We probed it as thoroughly as we possibly could probe—in fact, it is probably one of the ones that got the most extensive attention in the Division, and I think it would be inaccurate to say that the Louisiana redistricting was one that did not send up alarm bells.

Senator **Biden**. Let me rephrase my question, Mr. Reynolds. I do not think I said that. I said once you concluded that the motivation on the part of the Governor was political and not racial, that helped you move toward the decision of granting preclearance, didn't it?

Mr. **Reynolds**. Well, no; I think the sequence is a little bit out of line.

Senator **Biden**. Then, why don't you tell me the sequence.

Mr. **Reynolds**. What I believe I said yesterday and what did occur was we went through an extensive analysis; we probed the mindset of the legislatures; we looked at the entire redistricting situation. At the conclusion of our full examination of the Louisiana redistricting, we were able to conclude, or I was able to conclude, that it was not something that had been motivated by the racial animus or by racial purpose, and that conclusion was based on the agreement, I think, of my staff and myself that there was no reason to ascribe discriminatory intent to the legislature, and certainly, my judgment after probing it that there was also no reason to ascribe discriminatory intent to the Governor of Louisiana.

Senator **Biden**. What was the Governor's intent?

Mr. **Reynolds**. The Governor was essentially, I think, trying to say—to ensure—that they had a fair and equal redistricting. He was concerned about the political aspects of the redistricting, and I think that that more than anything else was what gave him pause over the Nunez plan. He also felt uncomfortable——

Senator **Biden**. I am sorry. Which part gave him pause—that it was not fair and equal, or that it was not politically suitable?

Mr. **Reynolds**. The Governor expressed the view that he thought that it was—well, I think, that it was not suitable—he felt that it was not drawn in a way that was fair and equal or indeed, I think he had political reservations.

He felt that there was a lot of political motive that was behind the drawing of the plan, that the politics did enter into it. He also was concerned about the fact that the Nunez plan had been drawn in a way that divided the district differently than it had historically been divided; it did it in a way that in essence cut the districts in half and established an all-white and an all-black district, and was probably, in his view, a districting that was—actually, that plan was more motivated by race than he felt it should have been, that it should be, rather, a redistricting that does not indeed have the lines drawn because of race, but that race does not enter into that.

Senator **Biden**. Do you mean to tell me he did not sit there, in all the conversations you had with him, and the logs of your telephone calls, that he did not sit there and tell you, "Look, if that is a black district, they are going to elect a Democrat, we are going to lose the district, and we are also going to lose Livingston in the process"? He did not tell you that?

Mr. **Reynolds**. No; actually, I never heard the Governor say that.

Senator **Biden**. You never heard the Governor say that?

Mr. **Reynolds**. No, I did not, no.

Senator **Biden**. I thought, yesterday, we agreed that one of the rationales for the Governor doing what he did was to protect Congressman Livingston's seat.

Mr. **Reynolds**. Well, I think both Congressman Livingston and Congresswoman Boggs were concerned about the Nunez plan and the redistricting and the way it was done——

Senator **Biden**. I am sure they were, but let's stick to what the Governor was concerned about. That is what I am talking about here.

Mr. **Reynolds**. Well, I think that in the considerations that entered into the Governor's determination there were the political considerations as to Congressman Livingston's district, the considerations as to the way historically those districts had been drawn in the past, the consideration that he expressed as a concern of his with regard to packing all of the communities of one race into one district rather than to have the district drawn in a way that provided two influence districts. Those were all considerations that were very legitimate ones that he had in the process, and I did not see in any of those that they were driven by a racial motive or a racial animus on his part that was designed or was intended to have the districts drawn in a way that disadvantaged the black community.

Senator **Biden**. Would it be racially motivated if, in a future case, you concluded that a Governor or a legislature did not want an all-black district because that would mean it would be a Democratic district? Would that be a political motivation or a racial motivation?

Mr. **Reynolds**. Well, I——

Senator **Biden**. If that were the only factor; if they all sat down and said:

> Otherwise it makes sense to do this, but, you know, if it is all black, it is going to vote Democrat, and we do not want that. We have nothing against black folks. I do not care if it is black or whatever color, but it is going to be Democrat, and I do not want a Democratic district.

Would that be a racial motivation, or would that be a political motivation?

Mr. **Reynolds**. Well, I think the way you explained it, that would be a political motivation.

Senator **Biden**. I am not trying to trap you. What I am trying to do here is establish for the record, for future cases, that when you use the word "political" as distinguished from "racially motivated," that it is not always such a clear-cut thing, because there are many districts in the South, and there are many places at a local level in my State, your old State—you were introduced by both Senators, and I am not sure which State you claim these days, but I imagine you have as much interest in Delaware as you always have—that our State could, in fact, be—you could accomplish a racial objective through using a political rationale, because one way to keep black districts and blacks from having representation is to say, since all the pollsters show us, at least up to now, 90-some percent of the blacks vote Democrat, if you put them all in one district and give them that kind of power, it is a Democratic district, and so, Court, don't throw out that redistricting plan because we did not let blacks all end up in one district; go with it because we were politically motivated.

That is what worries me about your rationale.

Do you understand what I am trying to say?

Mr. **Reynolds**. I do, Senator. I think this goes back, though, to the discussion we had about the standards in the statute and why some are more difficult than others. If you are looking to see what the purpose was of the individual who was acting, and there is a political motivation, and it has an adverse racial effect, what we have in the statute under section 2 is a results test that allows you to reach precisely that because it is not something that is reachable; you can ascribe, as a result of the effects, a bad motive to somebody who, for very legitimate and honest political reasons, reaches the conclusion that you suggested. But the discomfort factor in that is that you could have a very valid political motivation; you could have a racial effect or an adverse effect on the minority community. And what you have in those circumstances is precisely what the district court went through in its analysis under the standard that was passed in section 2 that allows you to reach that kind of a situation.

In my section 5 analysis, that was not available to me, and I had to look to see what the motives were that were driving the redistricting. But I agree with you that your hypothetical poses that kind of a situation, and I think that the statute more than adequately enables one to deal exactly with what you are saying your concern was, by putting into the statute this new results test.

Senator **Biden**. Well, shouldn't we change section 5, then? It would save us a lot of trouble. Shouldn't the Attorney General be able to make the same judgments the Court makes? Why go through what we went through in Louisiana where, if, in fact, the standard for preclearance had been a section 2 standard, I assume you would not have precleared?

Mr. **Reynolds**. I think the reason for not changing the section 5 standard is that we are talking in section 5 about a unique procedure that Congress has devised with regard to a certain number of States, where they are precluded from putting into effect any change until it is cleared.

Section 2 is one where anybody can challenge the change. The way the scheme is set up now——

Senator **Biden**. I understand that. But why not have the standard? It is no more of an impediment to you in your investigation to apply a section 2 standard then a section 5 standard.

Mr. **Reynolds**. Well, I guess I would have to say that that may be right, although then you get into the situation where you have to be sure that the jurisdictions or all the parties have a fair hearing. We are not a court of law. There is nobody who is precluded from coming in after I have made my determination with a section 2 case and having that determination fully explored and aired with all sides giving the evidence in a section 2 case.

Senator **Biden**. With all due respect, I find that a distinction without a difference. The fact of the matter is they do not have a full and fair hearing in the way you mean it under section 5 now. And it seems to me that if you had found intent—which I think you should have, by the way, which I will get into in a minute—but if you had found intent, there would not have been, to use your phrase, a full and fair hearing.

So, would you support an amendment by myself and others to change the Voting Rights Act to have section 5 read as section 2, that if you find either intent or—bang, section 2 language—would you support that?

Mr. **Reynolds**. Well, section 2 is now something that we look at in the section 5 context, and we believe that the standard under section 5 incorporates section 2, and in our section 5 analysis, we do consider section 2. So I do not think there is a need to change the statute in order for you to have section 2 as an element of our preclearance review.

Senator **Biden**. Had that been the case on June 18 or whatever date it was, would you have precleared?

Mr. **Reynolds**. I think that the chances are very strong that had that been the standard that I had at that time, I would not have been able to preclear the plan, and would have objected to it.

Senator **Biden**. Now, let's go back over that again a little bit. Yesterday, we got into a discussion about whether or not the section—you pointed out to me that the Court did not find intent. And at least it was my impression that you offered that as weight to your argument that there was good reason for you not to have found intent.

Is that correct, or am I off on that? I do not want to put words in your mouth.

Mr. **Reynolds**. Senator, I was not suggesting that the Court's decision was weight to my argument. The Court did not review this under that; it reviewed it under the section 2 results test.

The point I was making, I believe yesterday, is there had been an indication that I had been overruled, or the Court had overruled my determination, and I was pointing out that because there were different standards that were in effect, the Court decided the case on the section 2 standard, and I had decided it on section 5.

Senator **Biden**. Well, I know my time is up, but let me clarify that one point, because it is a complicated point, if my colleague will permit me.

Does my colleague from Maryland mind if I pursue this just a few more minutes?

Senator **Mathias**. I am happy to agree that the Senator from Delaware should pursue this point.

Senator **Biden**. The point I was attempting to make yesterday was not that the finding the Court made, or the standard under which the Court made its judgment showed that there was intent, but specific factual findings on the Court's part indicated clearly there was intent on the part of the parties involved to discriminate against black people, and notwithstanding the fact that those findings of fact were not required in order to make a judgment that under section 2 there was a violation, nonetheless if you take those findings of fact, they establish intent even though the Court did not have as its obligation or its right, or its duty, to go forward and make a finding with regard to intent. It was not relevant to the section 2 finding.

But what they said clearly indicates that there was intent. The Court found the plan:

> With unerring precision, slices through the City's traditional sub-unit, the ward, in a racially-selective manner, leaving intact predominantly white wards while carving up those densely populated by blacks.

As to the Governor, the Court concluded, quote: "The Governor's opposition to the Nunez plan was predicated in significant part on his delineation of a majority black district centered in Orleans Parish." And in confidential portions of your staff memo, they brought to your attention the allegation that an important legislator, in defeating the Nunez plan in the basement said, quote: "We already have a nigger mayor; we don't need another nigger bigshot."

And the Court cited evidence of discriminatory intent on the part of other legislators, including the representative who testified at the Court hearing, that there were legislators, quote: "who didn't feel they wanted to have a district that would be able to elect a black representative."

Although he does not give actual evidence of intent, we have the conclusion of someone who, as I understand it, everyone considers an expert, Jeris Leonard, President Nixon's former Assistant Attorney General for Civil Rights, who said that this redistricting plan is "one of the most egregious and blatant racial gerrymanders that I have ever seen."

It seems to me that it is awfully clear that the Court had no trouble finding on a factual basis and outlining how it looked at this case, that there was clear, clear evidence of intent to discriminate against black folks. Now, the fact that it did not find intent—it did not say, "Therefore, we find there was intent too * * *"—that was not its role under section 2. But it seems to me, for purposes of making the point that I am attempting to make here, that a more thorough investigation, a more open-minded investigation, would have brought you to the conclusion that you acknowledge you would have come to had section 2 been in the law at the time you were checking the preclearance, as substantiated by the facts as presented to us, this committee—One, the Court findings; and two, your original staff memorandum, which said, "Hey, Brad, don't do it"—and yet, you come forward to us and say that under your narrowly prescribed—as you implied, narrowly prescribed—section 5 responsibility for preclearance, you looked at all these things thoroughly, and you did not see anything wrong. You did not see anything wrong under section 5. And I do not see how you could even look at that plan and not see something wrong, at least, not make you go:

> Now, wait a minute. Isn't it kind of curious? Isn't it kind of curious this "duck" just selectively rips apart black areas, occasionally hits a white ward, occasionally, but selectively—there is something wrong here.

I mean, just on its face. Just look at that—at that duck.

And then you have the Governor. You know, let me just be very blunt with you. What I think happened here is that your previous disposition was to clear; that Treen had himself a problem; that you had an instinct to let it go; your staff said no. You then spent a great deal of time, according to the telephone logs and your testimony, relatively speaking, conferring with the Governor or his people, and the Governor convinced you, "Look, this has nothing to do with race; this is politics. This is just politics. These people are trying to do me in here"—I am not putting words in his mouth, but that is the impression I get. Otherwise, that is the only thing I could see that would throw you off, because you are not—you are one of the brightest people who have testified before us in this committee. You are one of the best lawyers we have ever had. I have been here 13 years, and you are one of the best lawyers we have ever had sit in front of us that worked for the Federal Government. And you are clearly not a racist. You are not out there, saying, "Man, I want to get those blacks."

And then I sit back and I ask, if that is the case, how could he look at all this and not come to the conclusion that something was rotten in Denmark.

Anyway, I am going to stop. I would be happy to hear any response you want to make, and I will not be offended if you have no response. But I want to tell you that is what troubles me about how you approached this case.

Whatever you want to say or do is fine with me. I yield the floor, Mr. Chairman.

The CHAIRMAN. Do you want to respond any further, Mr. Reynolds?

Mr. REYNOLDS. No. I believe I responded to the question, Senator.

The CHAIRMAN. Well, since Senator Biden said you are one of the best lawyers that ever appeared before the committee, and you are not a racist, I guess he will vote for your confirmation.

Senator BIDEN. I didn't say anything about his judgment.

The CHAIRMAN. The distinguished Senator from Maryland.

Senator MATHIAS. Thank you, Mr. Chairman.

I had not expected to start on voting rights, but since that is where Senator Biden left off, let me pick up there.

There was testimony yesterday, Mr. Reynolds, that the Justice Department was participating in, I believe, 26 pending cases brought under section 2 of the Voting Rights Act. Is that correct?

Mr. REYNOLDS. I believe we have been involved in 26 cases under section 2 since the Voting Rights Act was amended. I am not sure whether all of those are pending at the present time, though, Senator.

Senator MATHIAS. Would you provide for the record a list of all the pending cases brought under section 2 of the Voting Rights Act? And would you indicate the nature of the Department's participation in each case—whether the Department is an intervenor, whether it is amicus curiae; just what the nature of the participation is?

Mr. **Reynolds**. Yes, Senator. We can provide that.

Senator **Mathias**. And how long is the record open, Mr. Chairman?

The **Chairman**. How long do you want, Senator?

Senator **Mathias**. Just as long as it takes Mr. Reynolds to submit these answers.

The **Chairman**. Mr. Reynolds, how long would it take?

Mr. **Reynolds**. We could have that information to the committee by tomorrow, with no trouble at all.

Senator **Mathias**. Fine.

The **Chairman**. Is that satisfactory, Senator?

Senator **Mathias**. That should be adequate; no problem at all.

The **Chairman**. I might announce now that we plan to continue this hearing today and tonight, if necessary, and finish it. I do not wish to delay this nomination. I think most members know how they are going to vote. We expect to put it on the agenda tomorrow. So if you can get that information as quickly as you can, Mr. Reynolds, I wish you would do that.

Senator **Biden**. We will be here until four or five in the morning; there are about 54 witnesses.

The **Chairman**. Well, we are going to give them 3 minutes apiece and put the rest of the statements in the record. They can say in 3 minutes how they feel, if they are for him or against him, very briefly, and we will put the statements in the record.

Senator **Biden**. I agree.

Senator **Mathias**. The question is whether they can say why.

The **Chairman**. Well, they do not have to say why. They have a right to express themselves any way they want to.

Senator **Mathias**. Mr. Reynolds, as a practical matter, there have been very few successful section 2 lawsuits against practices that have been pre-cleared. Is that not so?

Mr. **Reynolds**. I believe that is correct, Senator.

Senator **Mathias**. But since 1981 when you came into the Department, the situation has arisen in at least three cases that has never occurred before. Private plaintiffs have successfully challenged voting practices that the Justice Department had precleared under section 5. Those three cases are *Major* v. *Treen*, *Buskey* v. *Oliver*, and *Gingles* v. *Edmisten*.

Gingles v. *Edmisten* is a familiar case here; Rufus spent a good deal of time in this room.

In addition to those three cases, there was a case that involved the Racing Commission in Greene County, AL, that had this subject under review.

Now, one of the most important responsibilities of the Civil Rights Division, as I see it, is the pre-clearance of voting changes that must by law be submitted to you under section 5 of the Voting Rights Act. This is the key mechanism that ensures that citizens who live in jurisdictions with history of official racial discrimination are protected from abridgement or dilution of the franchise on the basis of race. It is a high-volume business, particularly immediately following a census when the new census figures lead to redistricting and to reapportionment.

You have the benefit of a presumption that Congress placed in the Voting Rights Act, that the jurisdiction submitting the change must convince the Justice Department that both the purpose and the effect are nondiscriminatory. If you cannot be convinced of that, then it is the accepted practice that the change should not and cannot be implemented.

It is a little difficult for this Committee, let alone the American people, to evaluate how well the Civil Rights Division is enforcing section 5. There is very little direct judicial review, and if a case is later brought by private individuals under section 2, the private plaintiff has a much harder time making his case than the Justice Department does under section 5.

Given this background, I am surprised that in at least three cases, the Federal courts have struck down redistricting or reapportionment plans that your Division has previously approved, because all the odds are stacked in favor of your office. In each of the cases I mentioned—*Major* v. *Treen*, *Buskey* v. *Oliver* and *Gingles* v. *Edmisten*—the covered jurisdiction apparently convinced you that the changes were fair and nondiscriminatory. But in each case, a private party with the burden of proof against him, operating under section 2, convinced the Federal court that in fact they were discriminatory, or that they would have some discriminatory effect.

So what we have here, as far as we can discern from the record, is that the jurisdiction convinced you that the practice could not be successfully challenged under section 2, but in fact they were wrong. A successful challenge was mounted by a private party who did prove to the satisfaction of the court that there was discrimination although the Justice Department had found none.

I join with Senator Biden in saluting your legal talents, but I also think the judges who sat in the *Treen* case, in *Edmisten* and in the *Buskey* case were good lawyers, too. Where did these good lawyers differ on this question? How did this come about?

Mr. REYNOLDS. Senator, in all three of those cases, the pre-clearance decision was made prior to enactment of the section 2 amendment by Congress, which put into the statute a new standard that was unavailable to the Department of Justice in reviewing the cases under section 5. And in all three of those cases, the court's disagreement was centered on the basis of the new results test and concluded on the basis of that different test that each of those voting changes that had been pre-cleared could not pass the discriminatory results test that Congress had enacted subsequent to the action that I took.

Senator MATHIAS. Well, I understand about the 1982 amendment to section 2. But are you saying, then, that if the amendment had occurred prior to the section 5 determination the pre-clearance would have been denied?

Mr. REYNOLDS. Well, I have already spoken to Senator Biden's question on that with respect to Louisiana, and I think that that would well have been the case in the Louisiana redistricting matter that was before me.

With regard to the other two, I cannot say now without going back and reviewing the records whether indeed, we would have reached a different conclusion had we had that new standard available to us.

Senator **Mathias**. Is this a problem that your predecessors have had to contend with?

Mr. **Reynolds**. Well, Senator, no, because section 2 was not in the statute when my predecessors were reviewing these—the amended section 2 was not available to my predecessors, either. They followed the same standard under section 5 that I followed with regard to the three matters that you have indicated, and the courts did not have the ability to review their pre-clearances under the new section 2 standard which came into effect in July 1982.

Senator **Mathias**. The *Buskey* case, however, was not a results case, was it?

Mr. **Reynolds**. That is correct; *Buskey* was not a results case.

Senator **Mathias**. It was a purpose case. Doesn't that make some difference in the situation?

Mr. **Reynolds**. That does make a difference, that is right. I just was handed the file on *Buskey*; you are correct. The court, in the *Buskey* case, made a purpose finding, that is correct.

Senator **Mathias**. So the amendment really would not have affected that situation?

Mr. **Reynolds**. The amendment would not have had effect. I made my decision that there was no purpose in the *Buskey* case, and the court disagreed with me.

Senator **Mathias**. The court said you were wrong.

Are there any other cases in which this kind of a factual situation has unfolded, either in your own time or in your predecessors' experience?

Mr. **Reynolds**. I am sorry; what kind of a factual situation do you have reference to, Senator?

Senator **Mathias**. A situation, say, like the *Buskey* case. Is that unique?

Mr. **Reynolds**. The only other case I am aware of where the court has disagreed with the determination made under section 5 is the *Greene County* case, that I believe you also mentioned. Greene County was a situation where the determination made by my office was that the change in question was not one covered by the statute. There was no disagreement as to the racial effect, or racial purpose of the change, but we felt that it was not a change affecting voting because it was one that dealt only with the change of the appointment powers from one body to another. The court disagreed with us in that case, the district court disagreed.

Those are the only two I am aware of, Senator, where there has been a disagreement.

Senator **Mathias**. Now, let me say that I approach the job of interpreting the intent of Congress with a great deal of humility. I am not sure that I always can interpret what was intended by 535 members of Congress, or even by the members of this committee. But my recollection of the intention of section 5, was to forestall lawsuits under section 2 by requiring the covered jurisdictions to satisfy the Justice Department and the Attorney General that the practice involved is not likely to be the subject of a successful private challenge.

How do you feel about the performance of the Civil Rights Division in its administration of section 5? Do you feel that it is performing this screening function in a satisfactory way?

Mr. **Reynolds**. Senator, I mentioned earlier, I think, that the section has done a remarkable job in its performance under section 5. I believe that, as I said, there are only two cases where the courts had disagreed, that I am aware of, of all the ones that we have been involved in. Since the passage of section 5, I think we are talking about 25,000 voting changes, and most of them are preclearances. The Montgomery, *Buskey* v. *Oliver* one is one in which we precleared a district that was 68 percent minority, and the court felt that the drawing of the district at 68 percent minority was done with the purpose of disadvantaging the minority voting opportunities, and on that one, I disagreed as a factual matter with that particular one.

Greene County was a procedural question that dealt with what a voting change is. I think that is a different question that indeed, within my office, we had disagreement on that particular one by a number of people.

But if you take the activity of that section, what we have done under section 5, the volume, the amount of work that has been done, I think that anyone looking at it objectively would have to say that it has really been an extraordinarily fine enforcement activity, and there are only two cases that I am aware of where there has been any disagreement at all with regard to the calls that we have made on the section 5 cases.

Senator **Mathias**. Well, now——

The **Chairman**. Senator, your time is up, but there is no other member of the committee here, so you just go ahead with your questions.

Senator **Mathias**. Thank you, Mr. Chairman.

Mr. Reynolds, I am wondering if you will be kind enough to refresh my recollection of the sequence of events in the *Gingles* and *Edmisten* case. Was the preclearance decision made before or after the 1982 amendment to section 2?

Mr. **Reynolds**. That was before the 1982 amendment to section 2.

Senator **Mathias**. Your preclearance came before the amendment?

Mr. **Reynolds**. That is correct, Senator.

Senator **Mathias**. When private parties have to enforce rights under section 2, the usual method is litigation—slow, costly, cumbersome. It costs the local jurisdiction money, it costs the local taxpayers money, it costs everybody money. What changes would you make to ensure that discriminatory changes in voting practices are detected and stopped at the section 5 preclearance stage, rather than letting it drift into the section 2 litigation for vindication of voting rights? What recommendations would you make?

Mr. **Reynolds**. Senator, based on the record I outlined, I am not sure that there is a need for any changes in that regard. As I say, there have been two that have resulted in a situation that would question the section 5 process in any way, shape, or form by using section 2. I think that the way that the statutory scheme now works, it is very effective in terms of achieving the purpose that you outlined, and certainly, the way it has been operating in the

Division since the passage of section 2, I think that the track record demonstrates that the application or implementation of section 2 as it overlaps with section 5 has been very effective in achieving the purpose that you outlined.

There will be, I am sure, no matter who is the Assistant Attorney General of Civil Rights, certain cases where there is going to be a disagreement among some people, indeed, maybe a disagreement with the courts. I think that is inevitable, because there are complex and difficult issues that have complicated fact situations, and a whole host of different matters that have to be taken into consideration.

But there are very few that have occurred in the last 2 years—only two—where there is a direct disagreement that has been demonstrated, and I think that the Congress has devised a statutory scheme that is effective, and the Division has put in place a process to implement it that is also very effective.

Senator **Mathias**. I hear what you are saying: that there are only two. Only two, of course, is a very small number. But when you consider that there have never been any before, two is two too many, it seems to me.

Mr. **Reynolds**. There was no section 2 as amended before, Senator, which may be one reason why there were none before.

Senator **Mathias**. Well, let's pass on and look at another subject. I understand you are not enthusiastic about class-based relief. Is that correct?

Mr. **Reynolds**. Well, Senator, I think that if by "class-based relief" we were to be referring to affirmative action remedies in the nature of outreach and recruitment and efforts of that sort, to ensure that increased numbers of minorities or women are brought into the applicant pool and considered for opportunities on a nondiscriminatory basis, I certainly favor that and fully endorse it. My difficulty——.

Senator **Mathias**. What I mean by class-based relief is relief that seeks to remedy discrimination by requiring race-conscious or gender-conscious treatment of individuals who are members of a class that has historically suffered some discrimination.

Mr. **Reynolds**. Then I would agree with your statement, Senator.

Senator **Mathias**. That you are not enthusiastic?

Mr. **Reynolds**. That is correct.

Senator **Mathias**. And you prefer to provide relief to individuals who are proved to be personal victims?

Mr. **Reynolds**. I believe in nondiscrimination, and by nondiscrimination, I think that requires that we can neither favor nor disfavor any individual by reason of his or her race or sex. And if you are a victim of discrimination, then you are entitled to be made whole and entitled to the full measure of relief in order to be sure that you are made whole. But I think that if we are talking about relief, that it reaches those who have not been victimized by the discrimination that is in question, then a remedy that will favor or disfavor or advantage or disadvantage any indvidual because of that person's skin color or gender is, I think, unlawful under our Constitution and our laws that are on the books.

Senator **Mathias**. You have applied the policy that you just outlined to the field of employment, have you not?

Mr. Reynolds. That is correct.

Senator Mathias. And it has been very controversial.

Mr. Reynolds. That is correct, Senator.

Senator Mathias. Would you also apply it to the area of housing?

Mr. Reynolds. I think that that is the same requirement in the housing area; that is correct. I think the law is the same whether we are talking about housing or employment.

Senator Mathias. As I understand it, the Department intervened in a private party fair housing case for the purpose of attacking class-based relief in the northern district of California.

Was that done at your direction?

Mr. Reynolds. Is that the *Gersten* case, Senator?

Senator Mathias. Yes.

Mr. Reynolds. Yes; that was a decision that I made; that is correct.

Senator Mathias. You directed that intervention.

Mr. Reynolds. That was a case where there was a quota ceiling being placed on the number of units that were available, and once that ceiling had been reached, there were no additional blacks who were allowed to have any housing or rented any units or have any of the housing units in the complex. Those units were reserved for whites only. And my view was that the law does not tolerate a set-aside where you are denying blacks the opportunity to have a full measure of access to the units as whites. We challenged that, and we resolved it by a consent decree where the defendant agreed that there would not be any further exclusion by reason of race of blacks who wanted to get into the complex.

Senator Mathias. The Department has prepared a list of consent decrees that were filed under the Fair Housing Act since 1981. It has also made a summary of the individual relief reported in each one of these cases. Would you feel that this would give a reasonable and accurate profile of the Department's success in this area?

Mr. Reynolds. Well, I am sure it is accurate in terms of reflecting what has happened with regard to our cases. As I have indicated before, Senator, in the housing area, because most of the housing litigation had been farmed out to the U. S. Attorneys' offices, it was not until 1983 and into 1984 that we really were able to bring that whole enforcement activity back into the Department, gear it up, put a special unit on it, and begin to have the kind of successes at the rate that we are now having them, which exceeds the rate that the Department has had in the past.

But, certainly, the list would reflect the results of the cases that are listed there.

Senator Mathias. My problem with your approach to this, Mr. Reynolds, is that you are not achieving a great deal of relief for the people who need relief.

According to the information I have just mentioned, which came to me from the Department, there have been 35 consent decrees entered in title VIII fair housing cases since January 21, 1981—35. They involve a total of 44,000 housing units at a very minimum. If you disagree with any of these facts, I think we ought to make sure the record is accurate. There were 35 cases involving a minimum of 44,000 housing units. But in terms of individual relief—which is the goal that you seek instead of class action—in terms of individual relief, I can only find one case, and in that case, the victims apparently are still being identified. It is a Massachusetts case of *United States* v. *Community Planning and Development Association.*

Leaving that case aside, there is only one case that has come to my attention in which the victims obtained monetary relief. That is *United States* v. *Seymour Orlofsky,* which came out of the southern district of New York, in which 14 named individuals received $1,500 each, for a total of $21,000.

Beyond that, in one case seven people will be sent letters inviting them to reapply for housing. In another case, a bank will send specified letters to certain other named individuals. In another case, letters will be sent to all black persons who visited a certain apartment complex, encouraging them to apply for housing.

But as far as I can see, looking over this list, there is no other case in which an identified individual victim—he is the object of your attention, the individual victim—will receive any kind of cash payment or any kind of priority, or will receive any relief other than these kinds of palliatives that are offered: Letters of invitation, letters of encouragement to "Come see us again, come and look at the apartment again"—no assurance that if they do, they will get any better treatment than the first time.

Is this the fruit of 4 years' work of the Civil Rights Division in the enforcement of the fair housing laws—14 individuals got $1,500 each, for a grand total of $21,000? Is that the bingo?

Mr. REYNOLDS. Well, Senator, what I think you are not finding reflected in the listing that was provided to you is the fact that in every one of our housing cases, we have as an element of relief that the discrimination has to stop and that affirmative efforts have to be made by the developers to seek out and bring into the complex those people who have been denied and disadvantaged. They have to advertise that they are an equal housing entity, that there are no barriers to entry. When you have that many complexes where you have discrimination, what you are trying to do and what you have to do is you have to end the discrimination, open up those complexes, and make them available for people of all races to enter, and those who want the units to have available to them those units on a nondiscriminatory basis.

We have a comprehensive feature of our decrees that imposes on the owners of those units, on the developers, that kind of a program that is designed to bring into the housing unit minorities, women, whoever have been denied before, excluded, not heard about them, not given them notice—whatever kind of racial steering went on—all of that comes to a halt; we monitor it, and those—whatever the number was—units are now all units that are available on a nondiscriminatory basis for individuals to have access to.

In terms of the individual victims' relief, we undertake to identify all those who have claims of discrimination, who claim that they are victims, and we ensure that they are made whole. The list—I do not doubt at all the list that is provided to you—identifies those that we have been able to find as victims.

Senator MATHIAS. One of the useful purposes of a hearing of this sort is to set the record straight. Where the record is inadequate from the point of view of either side, we can make sure that the record is completed—that it is full. So any additional information you can throw on this subject which reflects the achievements of the Department on this subject would be appreciated. I would suggest that you provide that additional information for the record.

Mr. **Reynolds**. Certainly, Senator.

Senator **Mathias**. Earlier this year I met with the Secretary of HUD. Representative Hamilton Fish was also present. We discussed the possibility of new legislation in the fair housing field. I understand that the General Counsel of HUD has submitted a copy of the draft with which we were working to you for your opinion. Do you recall that?

Mr. **Reynolds**. Yes, I do, Senator.

Senator **Mathias**. If you recall the bill itself, you will remember that the bill relies on an administrative enforcement process to resolve individual housing discrimination complaints. What is your view on the use of administrative law judges to hear and determine garden-variety housing discrimination complaints?

Mr. **Reynolds**. Senator, the administration originally had submitted a bill, as you are aware, in the last Congress, that did not include that feature. There have been discussions with HUD on whether we should undertake to modify or change the administration's bill in order to include that. Those discussions are still going on and a determination has not yet been made as to whether that would indeed be a modification that the administration would care to make.

Senator **Mathias**. You do not want to venture a personal view on it?

Mr. **Reynolds**. Well, I think at this time, we are reviewing that matter, Senator, and it is——

Senator **Mathias**. Any prognosis, any projection as to when that review might come to some fruitful end?

Mr. **Reynolds**. I think everybody recognizes that that review is something that we have to conclude very shortly and get back to you, Senator, and Congressman Fish, along with any of the other Members of the Congress who are involved in that and to discuss it with them and talk about the——

Senator **Mathias**. As one of the best lawyers that have ever appeared before the committee, do you have any view as to whether or not there is a constitutional problem, a seventh amendment problem, in having administrative law judges award compensatory and punitive damages in cases of that kind?

Mr. **Reynolds**. Well, I think that that raises a constitutional question. I am not prepared at this time to suggest to the Senator that it is one that would be a problem or an impediment. But I will say that we have that under study, and it is certainly a question that was raised by that, and because it was raised by it, we are looking to see how serious a problem that might be.

Senator **Mathias**. Civil rights protection in the housing field has traditionally been directed at racial discrimination, sex discrimination and age discrimination. How do you feel about handicapped discrimination?

Mr. **Reynolds**. I believe that, certainly, civil rights protections are also attendant in that area. Our original bill was one that included as an element of it that there would be no discrimination on account of handicap in the sale or rental of housing, and I feel very strongly that that is a very appropriate provision for us to have in the bill.

I actually believe, if my recollection is correct, Senator, that there is not too great a difference between your proposal and the administration's proposal in that regard.

Senator Mathias. What is your view as far as families with children? Is that a basis for protection against discrimination?

Mr. Reynolds. Senator, I think that would be carving out a new area or new basis of protection that has not heretofore been recognized in any of the statutes before Congress. It certainly is not one that, I think, has a constitutional basis. It is one that the bill that was introduced last year, your bill, introduced that as a possibility, and it is something that we also are studying. It was not included in the administration's bill.

Senator Mathias. I have just one other brief subject to raise with you. I am an advocate of civil rights—an outright, outspoken advocate of civil rights. I have been for my entire public career, and in private life before that. My father had very strong feelings about civil rights, and lived his life that way.

When you came to see me prior to your previous nomination and confirmation, we had a conversation. And I said to you, "Now, you are going to be the Assistant Attorney General of the United States in charge of the Civil Rights Division." And I said, "I think you must be the advocate—the advocate—of all those people for whom the civil rights laws had been designed to protect."

You said to me, "No, Senator. As the Assistant Attorney General for the Civil Rights Division, my job will be to enforce the law."

Is that a fair recapitulation of our conversation?

Mr. Reynolds. Well, generally, I think that there are some differences that I would have with you, but I think that that——

Senator Mathias. That is my recollection of it. Maybe because I was a little disappointed with your response, I have cast it in that vein. But I accepted that. I was disappointed, but I cannot argue with that. A law enforcement official's job is to enforce the law. I would like to see advocacy. I think advocacy is appropriate. But I accepted your word that you were going to be the neutral law enforcer.

My question comes in relation to the memorandum expressing your view that the Government should directly challenge the school prayer precedents in order to bolster support for the administration's amendment to the constitution.

I can see that as an Assistant Attorney General, you could have, without impropriety, a role in promoting the school prayer amendment—the President's school prayer amendment. I would oppose it very strongly myself, but I can see how someone who was appointed by the President would take that view.

I am disappointed that in this instance, you do not adopt the same rule that you did with me when I said you should be the advocate for the people who are protected by the civil rights laws. I am just wondering what the distinction is in your mind?

Mr. Reynolds. Senator, I am not sure which memorandum you have reference to. I know I did write a memorandum that was the subject of discussion with Senator Leahy earlier on the school prayer issue, and that memorandum very definitely is one that is aimed at a legal analysis, and my view of what the law requires with regard to that issue. My position on that was that the Department of Justice and Solicitor General should participate in that case, because of my legal disagreement with the precedents in the school prayer area.

Senator **Mathias**. But that was not the grounds which you stated in the memo. You said in the memo that:

> If it is indeed the final judgment of the court that it has no intention of budging from the ill-conceived precedents in this area.

We are entitled to disagree on that characterization of the precedents:

> If the court has no intention of budging from the ill-conceived precedents in this area, such judicial wrong-headedness reflected in an opinion of the court in this term may be just the catalyst needed to put momentum behind the President's efforts for a constitutional amendment.

It seems to me that that goes beyond mere enforcing of the law, does it not?

Mr. **Reynolds**. Senator, I believe that the statement you are referring to follows my urging based on a legal analysis of the position we should take in the case, which is my responsibility.

What ramifications might result or what might be the ramifications of that certainly is a relevant consideration for us to take into account, and indeed, there have been many who have urged that we were less sensitive to those kinds of ramifications in connection with the *Bob Jones* decision.

The memo is simply pointing out that after I had done my legal analysis and arrived at my conclusion and indicated my position as to what we should do with regard to filing a brief, that there were indeed some ramifications that would likely follow with the Supreme Court's decision one way or the other. And that was the sole purpose of that comment, but it was not at all to suggest that there was any political influence over my legal analysis, or that my decision with regard to the position to take in that case was anything other than one that was controlled by my legal analysis of the issue.

Senator **Mathias**. So you would say that that was dicta.

Mr. **Reynolds**. Well, I am not a judge, and so I do not think I would be presumptuous to characterize anything that I had written as dicta or not dicta.

Senator **Mathias**. Thank you, Mr. Reynolds.

Thank you, Mr. Chairman.

The **Chairman**. Thank you.

Mr. Reynolds, as I understand from the questions just asked by Senator Mathias, you felt it was your duty to enforce the law. That is the duty of an Attorney General and his assistants to enforce the law, isn't it?

Mr. **Reynolds**. It certainly is, Mr. Chairman, and if I could——

The **Chairman**. Now, if they feel that a change in the law is advocated, and the Supreme Courts have even reversed themselves—in 1896, we had separate but equal facilities; *Brown* v. *Board of Education,* passed in 1954, I believe, held to the contrary—but if you feel that justice demands a change in the law, you would not hesitate to take steps to bring that about, would you?

Mr. REYNOLDS. I certainly would not.

The CHAIRMAN. The distinguished Senator from Illinois.

Senator SIMON. I thank you, Mr. Chairman.

Mr. Reynolds, yesterday I expressed some concern that you have taken cases that deny opportunity for minorities and made sweeping generalizations on the basis of those, but have tended to take other cases that open up opportunities, and you have restricted the interpretation of those. And after the hearing, someone came to me, gave me a speech that you made on March 8 of this year, in Palm Beach Gardens, FL, and they said they thought I would find the speech interesting, and I did, indeed. It illustrates the concern that many of us have. And again, not reflecting on your ability or your integrity, but what many of us sense is a—"warp" is not the right word—but a bent that is not a healthy one. And if I can just quote two sentences from your speech, on the *Stotts* case, which denied job opportunities because of a seniority provision in Memphis to many blacks, you are quoted as saying, "Stotts may well represent the most siginficant victory for civil rights in this Nation in many years."

On the *Weber* case, you say:

> I would caution corporate America against over-reading Weber to suggest that title VII will permit a quite different voluntary affirmative action program.

That is the kind of thing that frankly disturbs some of us here, and if you should be confirmed by the Senate, I hope you will keep that in mind.

Senator Mathias asked about the handicapped. My staff, among other items, has this item, and I would be interested in your comment on it.

> With regard to the handicapped, Mr. Reynolds reversed the Justice Department's previous positions that institutionalized retarded people had rights to receive training and to be free from unnecessary confinement. This position has led to the resignation of virtually all of the professional staff lawyers working on such cases in the Civil Rights Division.

Is that latter part of my staff memorandum accurate? Were these resignations because of the position you have taken?

Mr. REYNOLDS. I have no knowledge that that is the case, Senator. I do know that there has been a turnover within the Civil Rights Division. I think that in that section, there has been quite a large turnover. But the people who have left have left at different times throughout the 4 years, and that is not unusual—indeed, the same kind of a phenomenon goes on yearly in the Department in all the divisions—lawyers come; they stay there for a time; if there are other opportunities that they are interested in, they move on. And I believe that has been the process that has worked.

I do not know personally what motivated any lawyer to leave the Department in any section.

Senator SIMON. Could you provide that information both to the committee and to my staff?

Mr. REYNOLDS. The attrition or the movement?

Senator SIMON. I am interested in finding out if people in fact did resign in protest to your determination on this question—the rights of institutionalized retarded people.

Mr. REYNOLDS. I know of only one lawyer that I think properly and accurately would fit into that category.

Senator SIMON. All right. If you could provide any information as to whether there are others.

Then finally, Mr. Reynolds, as I understand it, you are going to be having some jurisdiction over the appointment of Federal judges; is that correct?

Mr. REYNOLDS. Well, I do not think that that is quite accurate, Senator. Obviously, the Attorney General recommends to the President, and the President makes those decisions, and within the Department of Justice, there is certainly a process that exists with regard to the screening and reviewing of candidates or potential candidates for Federal judgeships.

If I am confirmed, I think that I would certainly be consulting on that effort with the Attorney General and with those in the Department that are working on that activity.

Senator SIMON. Let me just say in that connection, to the extent that you may have an input, there are those of us in both political parties who are concerned with the process as it functions right now. If there is anyone here from the American Bar Association—the Bar Association has not been as diligent as it might be in its screening. I fear we are undergoing an ideological swing that is more than usual to the right, and then if Democrats get in, you will have an ideological swing that is perhaps more to the left than it should be, and instead of finding stability in the courts, we find the opposite. There is a concern also, frankly, just on the of competency of some recent nominees. And I simply pass those two observations along for you and your colleagues at the Justice Department to consider.

I have no further questions, Mr. Chairman. I thank you very much.

The **CHAIRMAN.** Thank you.

The distinguished Senator from Massachusetts.

Senator KENNEDY. I thank the Chair. Mr. Chairman, I would just make a point. I would hope that if Mr. Reynolds is confirmed that you would also be alerted to the fact of the real failure of making the Federal judiciary truly representative of all Americans. At the time of Mr. Meese's confirmation hearing, of 167 Federal judges appointed by this administration, there were only 2 that were black, there were few Hispanics, and very small numbers in terms of women.

I think we would all agree that the courts in every aspect of the judicial system should be as reflective of our society as possible, so that there can be confidence by all citizens in the whole judicial system. This is something that many of us on this committee are very interested in and concerned about, and we would welcome the opportunity of cooperating at any time with the administration in ensuring that we are going to meet some of those basic requirements.

Thank you.

The **CHAIRMAN.** Thank you.

Does any other member of the committee have any questions of Mr. Reynolds? We will wind up with his testimony now before we go to other witnesses. I want to get through with him and release him. He has duties back in his office.

[Pause.]

The **Chairman**. I hear no response. I presume the Senators who had questions have come and propounded those questions.

If there is no response and no more questions, we are through with Mr. Reynolds. Mr. Reynolds, you are now dismissed, and you are welcome to leave any time you want to. The committee is through with you. I have given everybody an opportunity and a chance to ask any questions they want to of you.

Senator **Kennedy**. Mr. Chairman, I am sure it would be the case, but I would hope that as the proceedings move forward, if Mr. Reynolds desires to return to be able to comment on any of the other witnesses' testimony, that he will be afforded that particular opportunity.

The **Chairman**. Yes. Mr. Reynolds, after the witnesses are all through, if you care to make any comments, you are welcome to come back—you do not have to, though. People can make charges, responsible or irresponsible, and you may care to respond or you may not care to. You do not have to respond, but you are welcome to respond if you care to.

You are now dismissed, and we will take a 5-minute recess until these other witnesses are called up.

Mr. **Reynolds**. Thank you, Mr. Chairman.

[Short recess.]

The **Chairman**. The committee will come to order.

We have a few questions to be answered for the record by Senators Biden and Metzenbaum.

[Aforementioned questions and answers follow:]

U.S. Department of Justice

Office of Legislative and Intergovernmental Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

JUN 11 1985

Honorable Strom Thurmond
Chairman, Senate Committee
on the Judiciary
224 Dirksen Senate Office Building
Washington, D. C. 20510

Dear Mr. Chairman:

The enclosed responses are being provided by Wm. Bradford Reynolds to the written questions by members of the Senate committee on the Judiciary during the testimony. We respectfully request that these responses be made part of the record.

Sincerely,

Phillip D. Brady
Acting Assistant Attorney General
Office of Legislative and
Intergovernmental Affairs

Enclosures

QUESTIONS OF SENATOR METZENBAUM

Question 1:

Last Congress, the Justice Department took the position that a person who has been confirmed for an Assistant Attorney General position did not have to be confirmed by the Senate if he or she was appointed to another Assistant Attorney General position. Can you assure the Committee, that if you are appointed Solicitor General at a later date, you will come before the Committee for confirmation?

Answer:

Pursuant to Title 28 of the United States Code, Section 505, the Solicitor General is appointed by the President, with the advice and consent of the Senate. Thus, pursuant to the Senate's practices, the President's nominee for Solicitor General would require confirmation by the Senate Judiciary Committee.

QUESTIONS OF SENATOR BIDEN

Question 1:

Mr. Reynolds, organization of DOJ under the leadership of Mr. Meese is going to differ somewhat from that which was in effect during the tenure of William French Smith. Could you explain how the organization is going to differ and what your responsibilities as Associate Attorney General are going to be?

Answer:

In essence, the planned organization of the Department under the leadership of Attorney General Meese would change the allocation of criminal and civil responsibilities between the Deputy Attorney General and the Associate Attorney General. The Associate Attorney General would be responsible for the general supervision of non-criminal matters.

Question 2:

Why are these changes being made? Who developed this "organizational chart"? What role did you play in this reorganization?

Answer:

The contemplated changes will permit Deputy Attorney General Lowell Jensen to continue his oversight responsibility over all criminal matters at the Department. Attorney General Meese is responsible for the proposed changes and will coordinate with the Deputy Attorney General in developing an appropriate organizational chart. If confirmed, I would expect to assist the Attorney General and Deputy Attorney General in this effort.

Question 3:

Were these organizational changes made in response to criticism from conservative groups such as the Heritage Foundation? Were the changes made because they were necessary for more effective operation of the Department or to placate the convervative interest groups?

Answer:

Any organizational changes will be made by Attorney General Meese to reflect his priorities and improve the overall management and operation of the Department of Justice.

Question 4:

Mr. Reynolds, with all due respect, you seem to be a favorite of the Heritage Foundation. That organization's report, Mandate for Leadership, II, published earlier this year, was generally critical of the Justice Department under William French Smith and I gather that, in part, this criticism was based on the fact that some of the Attorney General's chief assistants and many of the Department's staff lawyers did not share the Heritage Foundation's enthusiasm for the conservative agenda. But you came in for lavish praise -- the Heritage Foundation says that you have done "an outstanding job" achieving the Reagan goal of pursuing "color-blind" policies in enforcing civil rights laws. I assume that means that you were sufficiently enthusiastic about the Heritage Foundation agenda, even if, as in the Bob Jones case, your arguments were rejected by the Court.

How do you view your responsibilities as the "chief policymaker" for the Department of Justice? Is that the role you intend to play? How much independence do you intend to allow the Assistant Attorneys General for the other divisions, such as Tax, Antitrust or the Civil Division?

Answer:

The Justice Department's chief policymaker is the Attorney General, who acts on behalf of the President, the chief policymaker for the Executive Branch. I would anticipate that the degree of supervision of the various Assistant Attorneys General, such as those for the Tax, Antitrust, and Civil Divisions, will not change significantly from the degree of supervision in the past.

Question 5:

It has frequently been the case in the Reagan Administration that the hierarchy of the Justice Department has been at odds with the staff attorneys. It is often the case that staff conduct investigations and prepare cases which are then turned down by supervisors. Sometimes, of course, junior staff may be wrong on the law or misguided about the approach taken to certain litigation. But there have also been instances, as we will hear about later in these hearings, when staff recommendations have been turned down on philosophical grounds, because certain kinds of cases do not meet the philosophical "litmus test" set up by this Administration. As the chief policymaker and supervisory attorney in the Department, how do you intend to handle these kinds of situations? When a staff recommendation is made, do you intend to make your decision based on what the law is or on what you think the law ought to be?

Answer:

All Justice Department officials have the duty to assist the President in taking care that the laws be faithfully executed. In fulfilling this obligation as Assistant Attorney General, I have encouraged frank and open discussion of all points of view. The focus of our efforts is always to determine the requirements of the law. As in the past, I will continue to insist that decisions are made based on what the law is.

QUESTIONS OF SENATOR BIDEN CONCERNING JUDICIAL NOMINATIONS

Question 1:

I'd like to ask you some questions about the Administration's plans with regard to filling the nearly 100 vacancies in the Federal courts and about what policies you expect to implement with regard to selection of federal judges. First, what do you understand your role will be in judicial selection?

Answer:

The Associate Attorney General advises the Attorney General on a number of matters, including recommendations on candidates for the federal judiciary. If confirmed as Associate Attorney General, I expect that I would be one of those advising Attorney General Meese on these matters.

Question 2:

Can you explain how judicial candidates are currently being evaluated and selected? Who sits on the committee in the Justice Department where final decisions on candidates are made? Who currently sits on the White House screening committee? Will you sit on those committees if confirmed? What standards will you use in evaluating judicial appointments?

Answer:

The Justice Department evaluates candidates for the federal judiciary by inquiring into legal experience, philosophy, knowledge, ability and temperament. This review is accomplished through interviews with candidates, interviews with associates and colleagues of candidates, and reading written materials.

The Attorney General receives advice from various Justice Department officials who participated in the candidate review, as well as from the Deputy Attorney General and the Associate Attorney General. The Attorney General then makes recommendations to the President. These recommendations are discussed at the White House, before a final recommendation to the President, in a meeting between Justice Department officials (including the Attorney General) and White House staff members (including the Chief of Staff, the Counsel to the President, the Assistant to the President for Political and Governmental Affairs, the Assistant to the President for Congressional Affairs, and the Deputy Assistant to the President for Presidential Personnel). The standards currently in place focus on identifying the best available candidate on the merits for each vacancy on the federal bench. These are the same standards I would use in rendering advice to Attorney General Meese.

Questions 3 & 4:

Do you believe judicial candidates' political or ideological views should be examined in assessing their fitness to serve on the Federal bench? In other words, do you think it is appropriate to ask about a candidate's personal views on social policy questions? What questions do you intend to ask nominees? Do you plan to ask for any assurances from candidates about how they will rule on specific issues?

Answer:

As mentioned above in my response to Question 2, one of the inquiries made by the Justice Department of judicial candidates is legal philosophy, and I believe this inquiry is appropriate. This inquiry may in some instances necessarily touch upon social policy questions, but the focus of the inquiry is the candidate's legal philosophy and not any specific political or social policy issues. If confirmed as Associate Attorney General, I do not intend to ask candidates for assurances about how they will rule on specific issues.

Question 5:

If a group of Senators advises the White House that they oppose a candidate for political or ideological reasons, how should the Administration react?

Answer:

If, in fulfilling the constitutional duty to advise and consent, a group of Senators expressed concern about a candidate and stated specific reasons, the Administration should evaluate that information with reference to the standards discussed above in my responses to Questions 2, 3 and 4.

Question 6:

Do you believe a person who belongs to a club that has no members who are black, Hispanic, or other minorities, and that has no members of the opposite sex (in most cases, no women) should be nominated to the federal bench? Do you believe that a judicial candidate should resign from such clubs before his or her nomination?

Answer:

I believe that persons recommended for nomination to the federal bench should resign before nomination from clubs that discriminate on the basis of race, color, creed, ethnic origin or sex in determining membership.

Question 7:

Administration officials have been quoted in the press as claiming that they have been unable to find qualified women and minorities for the federal courts. In the previous administration, the bar associations representing black and women lawyers were routinely consulted about judicial appointments. Candidates' names were solicited from these groups, and these groups participated in the screening and evaluation process. Early on, the Reagan administration decided to eliminate these groups from the process. The only organized bar group that now plays a role is the ABA. Don't you think you might find some qualified women and minorities if you asked the bar groups whose members are women and minorities to help you identify candidates? Would you be willing to call upon the National Bar Association, the Federation of Women lawyers, and other groups to provide names of qualified women and minorities?

Answer:

The Justice Department welcomes recommendations for candidates for the federal judiciary from any organization or person. I would encourage any interested person or organization, including the National Bar Association and the Federation of Women Lawyers, to bring qualified candidates for the federal bench to the attention of the Attorney General and other Justice Department officials, as well as to Senators involved in making recommendations to the President for the federal district court bench.

QUESTIONS OF SENATOR BIDEN CONCERNING ANTITRUST ENFORCEMENT

Question 1a:

Mr. Reynolds, as Associate Attorney General, you will have oversight over the Antitrust Division. As I am sure you are aware, this Administration has adopted quite a different and more lenient stance on antitrust enforcement. In fact, in some areas, such as resale price maintenance, it seems that the Justice Department has unilaterally decided to ignore the law of the land. In another important area of antitrust enforcement, there have been members of this Administration who have advocated elimination of the rule of treble damages in all so-called "rule of reason" cases.

Now in the Heritage Foundation report, Mandate for Leadership, II, it is recommended that the Administration should abolish the treble damages provisions for antitrust violations and adopt the 'rule of reason' in assessing damages. Since it appears you may use the Heritage Foundation recommendations as a blueprint for the next four years, I would like to ask you some questions.

Do you believe that the rule of treble damages should be eliminated in all antitrust cases?

Answer:

The Department is concerned about the treble damage rule in antitrust as it is currently formulated -- damages are automatically trebled, regardless of the circumstances, in every case -- but does not think the Congress should make any changes in the rule pending completion of a thorough study of its effects. As you are probably aware, Georgetown is conducting an extensive study of treble damages. We hope that research will provide some guidance as to whether or not some change in the current rule is appropriate.

Question 1b:

Do you advocate this principle for all of antitrust or for just the so-called "rule of reason" cases?

Answer:

There is sound thinking behind the concern that many have expressed recently about the effect of the treble damage rule on practices that may or may not be anticompetitive, depending on the circumstances. If the automatic trebling of damages puts too high a cost on practices that are often procompetitive -- the kinds of practices that are analyzed under the rule of reason -- then the rule is not maximizing consumer welfare and its reconsideration by the Congress is appropriate. I would like to stress, however, that severe monetary and other penalties, including substantial criminal fines and imprisonment, are clearly called for in hard-core antitrust cases - such as price-fixing, bid rigging and the like.

Question 1c.

Can you explain to me how American consumers benefit from this change, if, in fact, the less severe penalty will strike at the heart of the deterrant of the antitrust laws and make it less likely that private individuals will bring legitimate antitrust claims?

Answer:

The effect on consumers of any proposed change in the automatic treble damage rule now in effect is obviously of paramount concern, because the antitrust laws are themselves focused on consumer welfare. Until the results of the current study are received, however, it should not be concluded that any and all possible changes in the rule would affect consumers adversely. Rather, a major point of the study is to determine whether the rule is deterring conduct that is in fact procompetitive and that would thus benefit consumers.

Question 2:

The recommendation in the Heritage Report seems to say that all antitrust cases should be judged under the "rule of reason" standard. Do you endorse such a concept? Don't you believe that there are some anticompetitive actions that are so egregious that they should be judged as illegal per se?

Answer:

Some anticompetitive activities are indeed so egregious that they should be judged as illegal per se. For example, the courts should not be required to examine, under the rule of reason, the competitive effects of such practices as bid rigging, where clandestine agreements among competitors to allocate markets and raise prices clearly harm consumers. However, the courts should be quite careful in formulating per se rules; they should remember that the per se label was designed to apply to conduct that is always or nearly always anticompetitive.

Question 3:

It is said that this Administration never met a merger it didn't like. What kinds of mergers do you believe should be blocked by the Justice Department? Do you believe that mandated divestitures can solve most, if not all, anticompetitive problems raised by large corporate mergers? Do you believe that divestiture is preferrable in all instances to blocking a proposed merger?

Answer:

If confirmed, I would approach merger enforcement in a manner consistent with the approach that the Department has taken during the past four years. Mergers frequently have economically beneficial effects, because they improve efficiency and thereby benefit consumers and improve the ability of U.S. firms to compete in international markets. Sometimes, however, mergers can lessen competition and thereby adversely affect the interests of consumers. In these latter cases the Department of Justice should take steps necessary to prevent consumer harm. The decision on whether or not to take action should be based upon an economic analysis of the effect of the merger in the markets that are involved. Mergers that raise competitive problems are almost always mergers among firms that are competing in the same market (horizontal competitors), though occasionally mergers among firms with a vertical relationship or firms that are potential competitors can raise significant antitrust issues.

Frequently, economic harm stemming from large mergers can be prevented by divestiture of certain severable business lines. In such cases, if the parties are willing to eliminate the competitive problem by divesting certain assets, the government should not seek to block the merger of remaining assets that would create no anticompetitve threat. If divestiture solves the competitive problem, the companies can proceed with the remainder of the combination and thereby gain any resulting efficiencies to the benefit of both U.S. industry and U.S. consumers.

QUESTIONS OF SENATOR BIDEN

Question 1:

Mr. Reynolds, the day before the confirmation hearing for Lowell Jensen to be Deputy Attorney General, the Justice Department disclosed the corporate indictments and civil injunction which had been "negotiated" to conclude one of the largest criminal fraud investigations to come before the Justice Department in recent memory. Two thousand counts of wire and mail fraud were leveled against the brokerage firm of E.F. Hutton on account of cash-management practices which, most simply, came down to a pervasive scheme of check-kiting. As many as 40 individuals were granted immunity from prosecution in order to untangle a scheme which, in the estimation of the U.S. Attorneys handling the case, placed the security of our national banking system in jeopardy. Yet no one -- not a single person -- was individually prosecuted for this crime. The corporation has agreed to pay restitution of about $8 million to the banks who came up short. Otherwise, it's business as usual at E.F. Hutton.

The day of Mr. Jensen's hearing, I indicated my outrage that no individuals had been held accountable for this wrongdoing. I made a request to our distinguished Chairman that hearings be held on the question of personal accountability for corporate crime, and those hearings are now set for later this month (June 25 and 26). I hope to cover a number of issues at those hearings and particularly, to get a full explanation from all those involved in making these decisions at the Department of Justice as to why no one was indicted or prosecuted for the crimes committed.

To my mind, the failure to prosecute individuals in the E.F. Hutton case, or the General Dynamics case, or the General Electric case, defies the most basic notion of how justice ought to work. Corporations do not commit crimes; people commit crimes, and when they do, they ought to be punished.

I expect Mr. Jensen and many of the people who work for him to come before this Committee and answer for their decisions on these cases. I realize, Mr. Reynolds, that you will not oversee the Criminal Fraud Unit or the Government Procurement Fraud Unit within the Department. But your jurisdiction covers other Divisions which will be faced with similar kinds of corporate prosecutions -- Criminal Antitrust, Environmental Crimes or Tax Fraud. And as the third highest ranking official in the Justice Department, your opinion on these matters will be highly valued. So I would like to know your views on the issue of individual responsiblity for corporate crime.

Under what circumstances should individuals be indicted for corporate wrongdoing?

Answer:

The Justice Department's policy is that both individuals and companies should be held responsible for their criminal conduct and that both individuals and companies should be prosecuted and, if convicted, punished. The only exception to this rule should be when the circumstances clearly demonstrate that justice can be best served by immunizing certain individuals to aid the criminal investigation.

Question 2:

Which individuals in a corporation should be held accountable - those who actually committed the crime, or those who knew or should have known that crimes were being committed?

Answer:

Those individuals in a company who engaged in criminal conduct should be held accountable for that conduct. This would include all individuals who committed acts with the criminal intent required to constitute a criminal offense, including those who actually committed the crime as well as those who were knowingly complicitous in the commission of the crime.

Question 3:

Do you believe that individuals should not be held accountable for corporate crime if they did not personally profit from the illegal activity? How do you define "profit" in such circumstances? Financial gain? Recognition or promotion within the corporate hierarchy? Making the corporation itself look good or increasing profits?

Answer:

Individuals who commit corporate crime should be held accountable for their criminal conduct whether the conduct resulted in a profit or not. In my view, any of the definitions in your question may constitute "profit" from crime.

Question 4:

What do you believe is the rationale for individual accountability -- punishment or deterrence? What do you believe is the greatest deterrence to corporate crime?

Answer:

The rationale for individual accountability is both punishment and deterrence, and each is important to the corporate crime enforcement effort. I believe the most effective deterrence to corporate crime is the conviction and punishment of offenders.

Question 5:

Do you believe that the public's faith in the fairness and evenhandedness of our local system suffers when no individuals are punished for major white-collar crime? Do you believe that fairness is an appropriate rationale in assessing accountability in these kinds of cases?

Answer:

Fairness is an appropriate rationale in assessing accountability in major corporate crime cases. Fairness and evenhandedness may well be enhanced through the prosecution in a given case of individuals who commit major corporate crime. However, in certain circumstances this may not be true.

With reference to the Hutton case, I would refer you to the proposed testimony of Assistant Attorney General Stephen S. Trott that was prepared for the Subcommittee on Crime, Committee on the Judiciary, House of Representatives; I am advised that your office has been provided with a copy of this testimony, but if I may be of assistance in this regard please let me know.

QUESTIONS OF SENATOR BIDEN CONCERNING LAND AND NATURAL RESOURCES DIVISION

Question 1:

Mr. Reynolds, one of the chief functions of the Land and Natural Resources Division of the Justice Department is providing appellate advocacy for the unit's client agencies, such as the Environmental Protection Agency or the Departments of Interior or Energy. The Division also works with those agencies in analyzing unfavorable district court decisions and preparing recommendations for those cases which merit court of appeals or Supreme Court review.

Now, we already have heard, and have read from materials you yourself prepared, that your theory of appellate strategy is sometimes guided by the old cliche "nothing ventured, nothing gained." Is this your approach toward environmental litigation as well? Do you believe that the Justice Department should reach to overturn longstanding precedents in environmental law, especially in an effort to impose cost-benefit analysis on environmental decisionmaking?

Answer:

My approach to environmental litigation in general and environmental appellate practice in particular is grounded in my view of how the federal judiciary should interpret the numerous environmental statutes enacted by Congress. Many of these laws, such as the National Environmental Policy Act, are written in very generalized terms. Others, such as the Clean Air Act, the Outer Continental Shelf Lands Act or the Federal Land Policy and Management Act, vest significant discretion in the heads of the executive agencies charged with administering those laws.

I believe that courts should apply to the generalized statutes such as NEPA the approach that the Supreme Court has repeatedly applied to such cases, namely a rule of reason as to that statute's requirement. With regard to other laws where a significant amount of discretion has been given to the Secretary of Interior or the Administrator of EPA, I would expect the federal courts to respect the informed exercise of that discretion. When courts fail to do so, preferring instead to substitute personal, subjective notions of policy, I would expect the government to appeal.

Finally, in the environmental area, many of the important statutes contain requirements for cost-benefit analyses. Determining how such requirements should be met, in my view, is generally the duty of the client agency rather than the Department of Justice.

Question 2:

In the most recent Annual Report of the Attorney General, the creation of the Environmental Crimes Unit within the Environmental Enforcement Section is touted as one of the Division's most important new initiatives. The unit is to prosecute cases of national importance that involved significant environmental misconduct, such as deliberate disregard for pollution control requirements which creates serious environmental contamination or human health hazards, or deliberate falsification of information required to be reported to the government. There are obvious analogies here to corporate crime in the securities area of government procurement fraud. What I would like to know is how you feel about individual responsibility for the commission of such crimes. Do you believe that indicting just a corporation is enough or do you believe that there are times that the individual employees of a corporation who are, in fact, responsible for wrongdoing, should be held accountable? What kinds of policies will you recommend for the Environmental Crimes Unit to follow in this regard? Will it make a difference to you if serious human health hazards have been created?

Answer:

Certainly there is no policy in the Department of Justice encouraging the prosecution of corporations over the individuals themselves who are responsible for any corporate wrongdoing. Each case is evaluated, of course, on its own merits after what is usually a lengthy investigation aimed at determining where responsibility for only illegal acts actually and properly lies. Consistent with this Departmental policy, the policy of the Land and Natural Resources Division has been and will continue to be the pursuit of individual liability where the facts demonstrate who the responsible persons might be. The same policy discourages indictments solely against corporations unless the prosecutor is left with no other choice. The record established by the Environmental Crimes Unit over the past three years clearly supports the adherence to this policy. Of the nearly 100 indictments against corporations and individuals over this period of time, seven cases involved indictments against corporations only.

The CHAIRMAN. Senator Mathias made a request this morning for certain information, and we now have that response for him, if you will get that to him, if his staff member is here.

We will now continue the hearings on the nomination of William Bradford Reynolds to be Associate Attorney General of the United States.

We have a number of witnesses today, over 50 witnesses. In order to insure that each one of them is heard, we will limit their testimony. We had originally said 3 minutes, but to be sure we are leaning over backward to hear some of them who have come a long way, and we are going to extent that to 5 minutes. We are going to stop promptly in 5 minutes, so the witnesses had better arrange their testimony accordingly.

The entire statements will go in the record, but they can tell us in 5 minutes whether they are for him or against him, and give the thrust of their statements.

We have a number of Congress persons here, and we will be glad to hear from them.

Is Congresswoman Schroeder here?

[No response.]

The CHAIRMAN. Is Congressman Conyers here?

[No response.]

The CHAIRMAN. Congressman Leland is here.

We will go ahead, then, with you, Congressman Leland. We are glad to have you with us.

TESTIMONY OF HON. MICKEY LELAND, A U.S. CONGRESSMAN, STATE OF TEXAS, AND CHAIRMAN, CONGRESSIONAL BLACK CAUCUS

Mr. LELAND. Thank you very much, Mr. Chairman and members of the Committee.

I am Mickey Leland, chairman of the 20-member Congressional Black Caucus. It is in the name of this Caucus, on behalf of more than 25 million black Americans, and for the cause of justice and dignity, that I come before you today to oppose the nomination of William Bradford Reynolds as Associate Attorney General of the United States.

We are a Nation of diverse peoples, Mr. Chairman, who take pride in a Government which relies on its officials to faithfully execute their oaths of office and uphold the laws of this land. There are no caveats to these basic tenets of democracy that this country knows so well. There are no disclaimers which say that we shall seek to enforce fully only those laws with which we agree.

There are conditions in this country which require that we act in the affirmative to redress inequities and preserve and protect the fundamental rights bestowed by our Constitution. Those who obstruct our progress toward this goal do themselves inflict a grave injustice. Let us recall the words of Dr. Martin Luther King, Jr., who said, "Injustice anywhere is a threat to justice everywhere."

This task you undertake is critical to the champions of justice who have fallen in the struggle for human dignity in America. We cannot afford to reward those who disgrace their legacy. The consent of the governed is basic to American democracy. Our branches of Government touch one another in resolving some of the most critical questions impacting American society. Our responsibility to respect the constitutional mandates of each branch is absolute. To reject this proposition not only inflicts a grave injustice on those who are governed, but more importantly, Mr. Chairman, heads us toward a system that is not a democracy as we know it in America.

Members of the committee, the Congressional Black Caucus appeals to your sense of propriety in looking carefully at the record of one who has been vested with the responsibility to protect the right of Americans—all Americans—to an equality of opportunity and justice under the law.

This nominee, William Bradford Reynolds, has written a history that can be characterized only as an attempt to discredit and destroy those Federal initiatives which were America's covenant with her people.

Not long ago, Mr. Reynolds in a speech on race relations in contemporary America said, "Our rights derive from the uniquely American belief in the primacy of the individual. And in no instance should an individual's rights rise any higher or fall any lower than the rights of others because of race. Whatever group membership it inherits, it carries with it no entitlement to preferential treatment over those not similarly endowed with the same immutable characteristics."

Moreover, during these remarks, Mr. Reynolds stated that affirmative action was immoral and that it was a racial spoils system. He said that the Reagan administration would attempt to make whole actual victims of discrimination but would do nothing to help groups overcome centuries of discrimination.

Mr. Chairman and members of the committee, no informed person can deny that we have struggled long and hard to bring justice to those in our society who have been subjected to institutional and pervasive discrimination. The unique role of our advocacy as members of the Congressional Black Caucus points to the continued need for aggressive affirmative action. Our numbers themselves pose a telling story.

Let the record show that the members of the Congressional Black Caucus are united in our view that affirmative action remains a vital weapon in efforts to eradicate, once and for all, the wholesale discrimination against groups in our society and the exclusion of those groups from meaningful participation in the economic, social, educational, and political institutions in this country.

A number of my colleagues and I have directed a letter to you which charges that for the past 4 years as Assistant Attorney General for Civil Rights, Mr. Reynolds has tenaciously refused to enforce civil rights laws—laws—with which he personally disagrees and has zealously sought to cripple or nullify those laws by judicial and administrative action. This is not a record to be proud of or reward.

It should not go without note that the June 4 Washington Post editorial page calls on this body to reject this nomination. The Post graphically outlines the Reynolds record and charges him with aggressively attempting to dismantle existing programs peaceably using remedial approaches which he challenges. Their charges, as do ours, clearly suggest that he has evidenced little compassion for the victims of discrimination.

But equally as fundamental is the message we convey to the Nation—if not the world—by this nomination. And that is by implication, our Nation is no longer concerned about trying to redress society's historic racial wrongs. If there is time for conviction, it is now.

I thank the chairman and the committee for your patience.

The CHAIRMAN. Thank you very much, Congressman Leland.

Senator Kennedy?

Senator KENNEDY. Thank you very much, Mr. Chairman.

I want to join in welcoming Congressman Leland, the Chairman of the Black Caucus. He has now the largest number of blacks as members of the Black Caucus at the present time, haven't you, Congressman?

Mr. LELAND. No, we are not. As a matter of fact, ironically, you bring that question at this particular hearing, Senator. At our last session, we had 21 members of the Congressional Black Caucus. This session, we have 20 members of the Congressional Black Caucus.

Senator KENNEDY. There are some 20 million black Americans, are there not?

Mr. LELAND. That is correct.

Senator KENNEDY. I think that is really what the Voting Rights Act is all about. It seems to me that you have made a strong presentation here.

I would welcome if there has been any aspect of the civil rights record of the Justice Department over the past few years in which Mr. Reynolds has been the principal architect that you find some degree of encouragement or solace from. We have heard what Mr. Reynolds says that he might agree with the goals of civil rights, but he believes in a different means of achieving those goals.

He says that his way is really the correct way in terms of being able to maximize the opportunity for the destruction of discrimination and prejudice.

As someone who has followed those issues very closely, how persuasive should we find that particular argument?

Mr. LELAND. Senator, I can only say that since Mr. Reynolds has been empowered to supposedly protect the interests of civil rights, particularly as they are stated in law, we have fallen behind in our efforts to achieve equal status in this Nation as blacks, and I might add, other ethnic minorities and women. So we find ourselves in a very desperate circumstance of life in 1985, and particularly as we have realized Mr. Reynolds and his participation in the administration or the lack of administration of justice.

Senator KENNEDY. Let me finally ask you this. I was very much distressed by the number of instances in which Mr. Reynolds overruled the professional staff in the Justice Department in a number of different areas—the Selma voting case; Mississippi voting rights cases; the Bob Jones case in terms of the IRS recommendation—I am not going to repeat all of them here. But I am just wondering whether we should also be troubled by the fact that there were repeated overrulings of professional staff and then, when these questions were brought to the judicial system, to the courts of this country, that Mr. Reynolds' view has been rejected.

I would be interested in your response.

Mr. Leland. Senator, I could not agree with you more. The professional staff at the Justice Department has been the purveyor of continuity of justice in America. And when, in fact, its level of professionality has been challenged by those who have been appointed and have been there for such a short period of time, it raises a real serious question, particularly when people of such great numbers are affected, are afflicted, if you will, by injustices that have been perpetrated not only by the historic discrimination and racism that has been rather elusive in recent years on those many millions of American people; but rather, when we consider the problems that one person can bring by overturning the professional wisdom that has brought a continuity through many different administrations, ideologically different administrations, philosophically different, and administrations that have been partisanly different.

So I could not agree with you more.

Senator Kennedy. Mr. Leland, in so many of these instances, there is absolutely no documentation of the basis for overruling the staff recommendations. As you rightly pointed out, we are talking about questions that affect the most basic and fundamental rights of our citizens—voting and the protection of those that have been institutionalized, for example. I think it is troublesome, because if we are not going to know the basis for those judgments, it makes it virtually impossible for the kind of appropriate oversight in those areas so that we can continue to see that that legislation is going to actually achieve the goals for which it was initiated.

I thank you very much. You have been very helpful, and I appreciate your taking the time to come over to the committee and give us your views.

Mr. Leland. Thank you, Senator.

The Chairman. The distinguished Senator from Illinois.

Senator Simon. Thank you, Mr. Chairman.

First, may I apologize to the other witnesses because I am going to have to go on to another meeting, but my staff will be here, and we will follow carefully what is said.

I had the pleasure and honor of serving in the House with our witness and seeing him in action and working with him.

You talked about a message to the world. As chairman of the Black Caucus, can you be more specific? What will be the message to the black community if we simply rubberstamp this appointment?

Mr. Leland. Well, it once again says that the administration, as it appoints people in very high authoritative positions, who make policy, particularly when they make policy regarding justice, if you will, Senator, is once again turning its back on black America, as well as the other ethnic minority communities of this country. That message should not be given because this Senate, this body, this committee, just cares too much about the interests of the ethnic minorities of this country to continually put forward people's names, like Mr. Reynolds, to hold the public trust and supposedly guard the public interest, and particularly black people's interests, as I speak for black people today.

We have seen just in the recent past with the confirmation of another person who was appointed to head the Copyright Commission, Ms. Hall—a person who glaringly has been most offensive by her history to the interests of particularly black people—a great example of the problem that we face in this community, the extension of stereotypes and the extension of the antithesis of what ought to be happening today, where we are in a struggle to fight for our lives and our citizenship in America—black people, that is—the administration continuously puts forward people to hold the public trust who work in opposition to that struggle. And that is what this represents, and it sends a very bad signal to black people. It says that the administration just does not care about black people's interests.

This man, by the way, Senator, is not just one who is a passive conservative, because we in the Congressional Black Caucus work with many conservatives, both on the Senate side and on the House side, and both on the Democratic side and the Republican side. We are right now in the midst of a debate on the antiapartheid bill in the House of Representatives where we talk about discrimination in its worst form. And I will tell you that we have very many sympathetic members on the Republican side who are deemed as conservative as well as conservatives on the Democratic side, who are working with us to try and right this wrong.

But Mr. Reynolds, on the other hand, has been working just the opposite, it seems, to enhance the wrong itself. And we cannot stand for this. We have to do what we can to oppose this, and we hope that this committee in its wisdom will do what is necessary to stop this appointment.

Senator SIMON. Well, I thank you very, very much. I agree with your comments, and let me simply add my appreciation for your leadership, not only on this issue but on a great many others. The people of Houston, TX chose wisely.

Mr. LELAND. And so did the people of Illinois, I might add.

Senator SIMON. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you. I see we have a mutual admiration society going on here.

Senator SIMON. We agreed on this in advance, Mr. Chairman. [Laughter.]

The CHAIRMAN. Thank you very much, Congressman Leland. We appreciate you taking the time to come and present your views.

Mr. LELAND. Mr. Chairman, I appreciate your giving me the time.

Thank you.

The CHAIRMAN. You are now excused.

Is Congresswoman Schroeder here yet?

[No response.]

The CHAIRMAN. Is Congressman Conyers here?

[No response.]

The CHAIRMAN. Well, we have given them all an opportunity to appear, and they have not appeared, so we will move on now to our other witnesses.

The first panel: Phil Neal, former dean, Chicago Law School, Freedman & Coven, Chicago, IL; James Blumstein, professor of law, Vanderbilt University; William Van Alstyne, professor of law, Duke University School of Law; Dick Howard, professor of law, University of Virginia School of Law—is Mr. Howard here?

[No response.]

The **Chairman**. Paul Kamenar, executive legal director and general counsel, Washington Legal Foundation. Please have a seat.

I believe that is panel 1.

If you gentlemen do not mind, please stand up, raise your right hand and be sworn.

Do you swear that the testimony you will give in this hearing will be the truth, the whole truth, and nothing but the truth, so help you, God?

[Witnesses respond in the affirmative.]

The **Chairman**. Have a seat. I want to thank you, gentlemen, for your appearance here, and we are now giving the opportunity to you to express yourselves on this nomination of Mr. Reynolds to be Associate Attorney General of the United States

Mr. Neal, would you care to proceed?

TESTIMONY OF A PANEL INCLUDING PHIL C. NEAL, FORMER DEAN, UNIVERSITY OF CHICAGO LAW SCHOOL, CHICAGO, IL; JAMES F. BLUMSTEIN, PROFESSOR OF LAW, VANDERBILT UNIVERSITY, NASHVILLE, TN; WILLIAM VAN ALSTYNE, PROFESSOR, DUKE UNIVERSITY SCHOOL OF LAW, DURHAM, NC; AND PAUL D. KAMENAR, EXECUTIVE LEGAL DIRECTOR AND LEGAL COUNSEL, WASHINGTON LEGAL FOUNDATION, WASHINGTON, DC

Mr. **Neal**. Thank you, Mr. Chairman.

My name is Phil C. Neal, and I have a very brief statement.

The **Chairman**. Excuse me. We have a light here, and it will go for 5 minutes, so when it turns red, you will know your time is up. But try to finish if you can; I hate to see a witness start and not finish, but I think in 5 minutes, you can give the thrust of your testimony, and then we can put the rest of it in the record.

Mr. **Neal**. Thank you, Senator.

To summarize my background very briefly, after graduating from law school and serving for 2 years as law clerk to Justice Robert H. Jackson, I practiced for several years in California and then entered teaching. I taught for about 13 years at Stanford Law Schoo and then was a member of the University of Chicago Law Schoo faculty for 22 years. I served as dean of the law school at the University of Chicago for 12 years, and at the present time, I am practicing lawyer and partner in the Chicago law firm of Friedma & Koven.

In the past few years, I have been involved as a lawyer in severa school desegregation cases. In that connection, I have had occasio for a considerable number of conferences, discussions and meeting with Mr. Bradford Reynolds and other members of his staff. On was a case in which the Government was an adversary, and tw others were cases in which it was ultimately decided that the D partment of Justice would file amicus briefs, taking positions generally in support of the position being urged by my client.

I have come here today for the purpose of giving the committee my impressions of Mr. Reynolds based on those opportunities to see him and discuss matters with him.

My experience has been, and it is my very strong conviction, that Mr. Reynolds is a first-rate, meticulous, analytical lawyer, and that the positions that he takes on specific problems and in specific cases are arrived at only after very careful review and analysis of the facts and the law in each case. In each of the matters that I have had before him, I have been subjected to very rigorous exploration both by Mr. Reynolds and by other members of his staff as to the evidence in the cases involved and the legal theories being advanced. And those explorations took place before the Department arrived at its position in those cases.

It was clear to me on all of those occasions that Mr. Reynolds was intent upon taking a principled and defensible position that was consistent with the decisions of the Supreme Court.

More generally, it is also my opinion as a long-time teacher of constitutional law that the policies and positions for which Mr. Reynolds has been criticized lie in areas of the law where there is fair room for difference of opinion among reasonable lawyers and decent people, including people on both sides who are genuinely devoted to the cause of civil rights.

I do not see anything in those positions which is fair ground for regarding Mr. Reynolds as a bigot or a fanatic, and nothing in my experience with him gives any support to such a view or suggests that he is not firmly dedicated to enforcing the civil rights of all citizens as defined by the statutes, the Constitution, and the decisions of the Supreme Court.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much.

Our next witness is James Blumstein, professor of law at Vanderbilt University.

STATEMENT OF JAMES F. BLUMSTEIN

Professor BLUMSTEIN. Thank you, Mr. Chairman.

I am pleased to participate in these hearings. I have a written statement for the record that I will submit, but I will speak from notes.

I am a professor of law at Vanderbilt University. By way of background, I have been the plaintiff and attorney in the voter residency case, *Dunn* v. *Blumstein;* I have been involved for plaintiffs in a variety of civil rights lawsuits, and I serve currently as the Chair of the Tennessee State Advisory Committee on Civil Rights.

I would like to make two general points. First, I would like to comment on the nature and scope of basic civil rights safeguards within our legal and constitutional system; that is, do they protect everyone, or do they protect protected groups. This, I will refer to as the fair shake versus the fair share concept.

Other issues, such as defining "discrimination"; the intent versus effects debate, and the scope of the remedy, the victim specificity issue, stem directly from how you view the fair shake versus fair share perspective.

Second, I would then like to evaluate Mr. Reynolds' performance.

Let me focus on fair shake versus fair share. Under the "fair shake" view, we are obliged to provide even-handed, race-neutral treatment. Fundamentally, this is an institutionalist or procedural point of view. Fair, race-neutral procedures and criteria are the civil rights agenda. Access, not outcome, is the key ingredient.

Under fair share, the focus is on results, on the numbers. The vocabulary talks in terms of representation or under-utilization in a work force. It diverts focus from process to specific racial or gender-based outcomes.

Fair shake and fair share have very different goals. The key question for civil rights policy is fair shake is the civil rights goal, or whether fair shake is merely a means to a race-conscious end? Some have talked about the racial piece-of-the-pie approach.

It is no wonder that fair share supporters worry about steps that are taken to establish fair procedures. Fair process assures no particular outcome. Fair shake supporters see fair process as an institutionalist goal, somewhat akin to freedom of speech. We do not fail to protect freedom of speech because of a fear of the consequences of that speech.

I would compare this to the administration's position in the *Bob Jones* case. The concern was separation of powers, not the merits of whether or not there should be tax exemption for racially-discriminatory schools. Who makes the decision, that is an institutionalist issue. So I see that separation-of-powers is involved in that decision, and again, I draw the parallel to free speech. And this hearing is not half the problem that appearing before a Jewish group to explain the right of Nazis to march in Skokie was.

Fair shake versus fair share is a key to understanding other issues. For example, the intent versus the effects debate, the victim specificity issue—essentially, the administration's position, as I understand it, is that civil rights laws protect the victim as a person. The alternative view has civil rights laws protecting victims as a people. I suggest that there is a fundamental difference between those two views.

Second, is it enough to deny confirmation that Mr. Reynolds supports the fair shake rather than the fair share viewpoint?

The administration view, in my judgment, is well within the legal and political mainstream. The Constitution, with exceptions, embraces the fair shake version. There are no racial entitlements; proof of racial discrimination requires intent to discriminate. The *Stotts* case, or the *Memphis Firefighters* case, on victim specificity, fits comfortably within this tradition. The Reagan administration has held the fair shake view since it took office. Its reelection suggests some degree of public support. Fair shake is a valid and indeed, the traditional civil rights approach. It accords with an appropriate view of the mission of civil rights.

In my judgment, the failure to confirm Mr. Reynolds on this ground is inappropriate and could seriously intrude on the ability of the administration to staff high-level policy posts with persons committed to administration policy.

Mr. Chairman, I do have the statement. Thank you very much for your time.

The **Chairman**. Thank you for your presentation.

[Statement follows:]

STATEMENT

OF

JAMES F. BLUMSTEIN

Professor of Law
Vanderbilt University School of Law

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

CONCERNING
THE CONFIRMATION OF WILLIAM BRADFORD REYNOLDS
AS ASSOCIATE ATTORNEY GENERAL OF THE UNITED STATES

Wednesday, June 5, 1985

Mr. Chairman, and Members of the Committee, I am James F. Blumstein, Professor of Law at Vanderbilt Law School and Special Advisor on Academic Affairs to Vanderbilt's Chancellor, Joe B. Wyatt. I am pleased to appear before the Judiciary Committee and to participate in its hearings on the confirmation of W. Bradford Reynolds as Associate Attorney General.

It may be helpful to the Committee if I provide some background information about myself. I serve as Chair of the Tennessee State Advisory Committee to the United States Commission on Civil Rights. I have had considerable experience in the civil rights field, having successfully brought the case that declared unconstitutional the durational residency requirement for voting (Dunn v. Blumstein, 405 U.S. 330 (1972)). I have served as a consultant on voting rights to Common Cause, the League of Women Voters Education Fund and the Election Systems Project of the National Municipal League. I have successfully litigated against race discrimination in housing and have successfully represented public employees unconstitutionally dismissed in violation of their fourteenth amendment rights. I have written extensively in the area of civil rights generally and voting rights in particular and prepared a report commissioned for the Department of Education during the Carter Administration on the legal issues surrounding the desegregation of postsecondary educational institutions.

As you know, Mr. Reynolds has served since the beginning of the Reagan Administration as Assistant Attorney General in charge of civil rights, and in that capacity has been somewhat of a lightning rod for critics of the Administration's civil rights policies. Somewhat ironically, an array of civil rights groups is using the occasion of Mr. Reynolds' proposed departure from the Civil Rights Division as a vehicle for attacking certain of the Administration's previous civil rights initiatives.

Opponents of the Administration's civil rights policies have criticized the Administration's approach as retrogressive, even anti-civil rights. William F. Gibson, chairman of the NAACP, has recently charged that President Reagan is "basically a ... racist" in his civil rights policies. Mr. Gibson indicated a change in tactics on the part of that organization in dealing with civil rights policies it opposes: "The NAACP is taking off the gloves in relation to dealing with the Reagan Administration" with respect to civil rights issues. It would appear that the Reynolds confirmation hearing is serving as a forum for this new rhetorical get-tough strategy.

Nearly always accompanying rhetorical heat is an unfortunate side-effect -- smoke which serves to becloud the issues. It is therefore constructive to set out and analyze the appropriate contours of the debate.

I.

In an executive confirmation proceeding, one starts with the strong presumption that the President should be able to appoint people whose views are compatible with overall Administration policies. As Charles L. Black, Jr., Sterling Professor of Law at Yale, has written: "[T]here is a clear structural reason for a

Senator's letting the President have pretty much anybody he wants, and certainly for letting him have people of any political views that appeal to him. These are his people; they are to work for him. Wisdom and fairness would give him great latitude ...." Black, A Note on Senatorial Consideration of Supreme Court Nominees, 79 Yale L. J. 657, 660 (1970). In short, a Senator's personal political preferences should not be determinative when a senior executive branch appointment is at stake.

The criticism directed against Mr. Reynolds is that he has been the personification of the Administration's civil rights program. That acknowledged reality cannot, under our system, legitimately be the basis for a decision not to confirm.

In the long run, emergence of such a practice could seriously undermine the entire Senatorial role in the executive confirmation process. The President is not without constitutional antidotes. Article II, Section 2 of the Constitution authorizes a President to make appointments by filling vacancies during a Senate recess. Those appointees serve until the end of the next session of the Senate. In addition, vacancies can be filled temporarily on an "acting" basis in a number of circumstances. Using the authority to appoint persons in an "acting" capacity in conjunction with the authority to appoint officers during Senate recesses often would allow the President to bypass the confirmation process if he believes that the Senate is using its confirmation authority abusively and in constitutionally inappropriate ways. The unhappy history of recent appointments to the board of the Legal Services

Corporation serves as an example of what can happen under these confrontational circumstances.[1]

Since there would appear to be a broad consensus supporting the presumption that an executive appointee should not be denied confirmation on the basis of policy disagreements with individual Senators, it is clear that much more is required to justify a negative vote on executive confirmation.

Ethical inquiry is appropriate, but such does not appear to be a concern in the case of Mr. Reynolds. The source of attack seems to be substantive in nature -- that the Administration's civil rights policies are so antithetical to established legal requirements that a negative vote is appropriate. In evaluating that allegation in light of the record, one must be scrupulous in differentiating legitimate differences of opinion from viewpoints that are so unsupportable as to be well beyond the American legal and political mainstream.

II.

What, then, are the civil rights issues that split the Administration from established civil rights interest groups? When all is said and done, I believe that there are three fundamental civil rights issues that separate the Administration from the civil rights leadership establishment.

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[1] In the Legal Services Corporation situation, Senate confrontationists at least secure a limited term for Administration appointees. If they were confirmed, they might serve beyond the President's term. In the case of high-level executive positions, the term would lapse at the end of the Administration in any event.

° What are the nature and scope of the basic constitutional and statutory civil rights safeguards? Are they essentially institutionalist precepts, primarily focusing on providing individuals of both genders and of all races and religions an equal opportunity to succeed on the basis of individual merit -- the "fair shake" approach? Or are they outcome-based entitlements for certain designated "protected" groups that have been traditional victims of discrimination on the part of public and private institutions and private individuals -- the "fair share" approach?

° What is "discrimination" and how is its existence proven? Can one give substantive and determinative weight to "effects" or "results" that are disproportionally disadvantageous to racial or gender-based groups as a means of proving discrimination? That is, can disproportional disadvantage in terms of outcome sensibly define "discrimination?" Or does such exclusive emphasis on racial and gender-based outcomes inherently, if subtly, signal a shift in underlying theoretical rationales -- from equal opportunity to race- or gender-based entitlements?

° What is the proper scope of a remedy to overcome "discrimination?" Must one focus on identifiable victims, or is it appropriate to provide race- or gender-specific preferential remedies to a class of plaintiffs that includes members who have suffered no direct, provable harm from the defendant's illegally discriminatory conduct? If victim specificity is not required, what is the underlying theory of remedy? Is it compatible with principles of equality of opportunity or only with principles of race- or gender-based entitlements?

Fair Shake vs. Fair Share

Under the "fair shake" approach, individuals have the legally protected opportunity to succeed on the basis of their abilities and their achievements. Success is not assured, and a good deal of after-the-fact inequality is expected as a natural consequence of the normal functioning of the economic marketplace. Proponents of fair shake recognize a general public responsibility to provide basic access to the tools of competition -- e.g., public education. There may be disagreements about the scope and magnitude of public responsibility for providing access to educational and other resources for disadvantaged persons, but that matter is well beyond anything involved in evaluating Mr. Reynolds' conduct.

The alternative civil rights vision, "fair share", diverts analytical attention from fair procedures and focuses instead on end results, on the numbers -- on female and minority "representation" and "underutilization" in a workforce.[2]

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[2] Fair share proponents frequently assert their commitment to a bottom line threshold of "qualified" persons for filling a race- or sex-designated slot. That constraint may be of some solace in certain positions or industries in which extra measures

Fair shake and fair share embrace a very different vision of what civil rights policy is designed to achieve. A broad civil rights consensus was possible when the coalition included persons of both viewpoints. For some, such as the Administration and Mr. Reynolds, fair shake was and still is the appropriate civil rights objective; for others, it was merely one means for achieving an ultimate goal -- a racial and sex-based piece of society's pie of benefits. When changes in income, status and voting power were not deemed sufficiently swift under the fair shake approach, some civil rights advocates adopted fair share as an expeditious shortcut, even though the policy instruments that often accompany fair share strategies appear to confront head-on the race-neutral vision of fair shake.[3]

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of quality are irrelevant to job performance. It is far from reassuring for positions or industries in which the "more qualified" routinely out-perform the "less qualified." For example, thousands "qualified" to run in the New York marathon, having satisfied basic entry requirements. It is certainly true that those who "qualified" are better performers than those who did not qualify. Blurring or disallowing distinctions among the ranks of the qualified, however, surely distorts ultimate performance. There is a great range in ability and performance capability among the "qualified." Ignoring that differential is a prescription for poor competitive performance.

[3] There is an analogy to this type of division in the area of fertility policy. In the late 1960's and early 1970's, the Zero Population Growth (ZPG) movement urged adoption of a population policy. They advocated small-size families so as to avoid population expansion. That view was essentially an environmentalist stance.

Allied with ZPG for a while were traditional advocates of family planning, whose goal was that each child should be wanted by its family. So long as family planning led to zero population growth, the groups' objectives were similar and they formed a coalition. If family planning did not achieve a stable population, the paths of the groups would diverge. Population policy advocates would propose more coercive methods for controlling population growth. For family planners, however, if

The shift from fair shake to fair share is usually subtle and not always admitted by the civil rights leadership, largely one suspects because such a "piece-of-the-pie" doctrine is so directly at odds with the formal and former program successfully promoted by mainline civil rights groups and now widely accepted. Some opponents of the fair shake approach such as Civil Rights Commissioner Mary Berry are forthright about their attitude. In her view, "[c]ivil rights laws were not passed to give civil rights protection to _all_ Americans ...." Instead, according to Ms. Berry, civil rights laws only protect "disfavored groups."

Intent vs. Effects.

Clearly, whether one adopts the fair shake or fair share doctrine has substantial implications about nearly everything else in the civil rights arena. As in so many other situations, how the issue is defined greatly influences how a program will be evaluated. For example, if one says the problem is containment of government cost for medical care, a policy analyst will not look with favor on a program to increase governmental financial

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all children in a very large family were planned for and wanted, that would be perfectly proper.

In the civil rights policy debate, the same type of underlying philosophical differences exist between fair shakers and "piece-of-the-pie" supporters. It is therefore inappropriate to speak as if all civil rights issues can be analyzed along a single continuum. Analysis must account for the fundamental core value splits between those who advocate competing visions of the proper mission of civil rights policy. To say that a person advocating fair shake is not enforcing the law or is retrogressing is misleading. Proper criticism must look at faithful adherence to fair shake principles.

support for enhanced access to medical care for the poor. By the same token, if the problem identified is the insufficiency of access to medical care for the poor, the analyst will not be receptive to a proposal to cut public funding for indigent care programs.

Similarly, if one believes in fair shake, as does this Administration, certain things necessarily follow. The evil to be addressed is race- or gender-based classification or disadvantage. Discrimination is volitional. The moral force behind the nondiscrimination principle stems from society's disapproval of intentionally discriminatory conduct. Concepts such as "discriminatory effect" are devoid of analytical meaning for those who support fair shake. Giving substantive content to disproportional effects necessarily relies on principles of race- or gender-based entitlements. Fair shake proponents recognize the problem of uncovering intentional discrimination as a matter of proof and are willing to identify, through the legislative process, mechanisms that can serve as proxies for discrimination that might otherwise go undetected. But the core principle of volition must remain, so fair shake advocates would insist that a defendant in a discrimination case always be permitted to defend such an action by a reasonable showing of good faith. Otherwise, albeit subtly and implicitly, more than the principle of nondiscrimination is at stake.

Is the Reagan Administration anti-civil rights by supporting legislation and regulations that require a showing of intentional discrimination? If one's goal is the "piece-of-the-pie" approach, then one might see an "intent" requirement as retrogressive. But for fair shakers such a requirement is fundamental if the enduring values and the integrity of the civil rights movement are to be sustained. Fair shakers concerned about ferreting out hard-to-detect discrimination might allow outcomes to suggest discrimination in certain carefully and legislatively delineated circumstances under a _res ipsa loquitur_ concept. But intent must remain the core value, and evidence of good faith must be a successful defense.

Victim-specific Remedies.

Perspectives on the issue of remedy also are determinatively influenced by whether the analyst adopts the fair shake or the fair share vision. Fair shakers see civil rights protections as helping blacks and women as _people_; fair share advocates tend to see civil rights protections as helping blacks and women as _a People_. Thus, fair shakers such as Mr. Reynolds believe that only specific victims of discrimination should receive redress. Actual victims should be held harmless and restored to what their position would have been but for the discriminatory conduct. Providing broad race- and gender-based remedies to non-victims is entirely unwarranted in this view and, in fact, should be vigorously opposed. Such remedies are premised on principles of racial and gender-based entitlements that are fundamentally at variance with the fair shake vision.

If one accepts the fair share agenda, a commitment to rid the legal system of non-victim-specific race- and gender-based remedies reflects a step backward. Insistence on victim specificity of remedy is long overdue in the view of those who have retained the fair shake perspective. For fair shakers equal opportunity is the beginning and the end of the civil rights agenda, and not merely a means toward achieving a system of racial and gender-based entitlements.

III.

The criticism of Mr. Reynolds and of the Administration by mainline civil rights groups can, therefore, be seen as a conflict involving fundamentally different visions of the mission of civil rights. For fair shakers, the fair share approach endangers the core values of the civil rights movement. It threatens to turn civil rights into business-as-usual pork barrel politics. As illegal conduct is further and further separated from illicit conduct, the special moral and bipartisan appeal of civil rights values recedes. The same moral undermining occurs when non-victims of discrimination are advanced ahead of similar non-victims whose misfortune is only that they were not of the preferred racial or sexual group.

For fair shakers, the fair share doctrine is unacceptably divisive. It is also dangerously close to being paternalistically racist and sexist in its apparent assumption that in a fair, meritocratic system members of "protected groups" would not be able to compete successfully. For fair shakers, the fair share ideology is unduly pessimistic. It takes the cynical view that a fair and open system in America is either unworkable or unenforceable. Instead of aspiring to undo racial and sexual barriers to meritocratic access to society's economic and political institutions, it substitutes one form of racial and sexual politics for another.

"Piece-of-the-pie" proponents often appear to believe that fair share is "pie-in-the-sky" because of their belief in the fundamental flaws in the American political and economic system. They are not willing to take their chances on success in a free and open system, even though most will not acknowledge that openly. Assured results are the objective, and governmental intervention to achieve that goal is seen as just another form of regulation of an already regulated economic or political marketplace. Sexual and racial entitlements are to be mandated because fair competition in the political or economic marketplace is either too slow or untrustworthy. In sum, result-oriented shortcuts, at odds with fair shake goals, are promoted, even at the risk of undermining the political and moral capital of the civil rights movement.

One can readily see the clash in civil rights visions that separates Mr. Reynolds and the Administration from the civil rights leadership. To vote against Mr. Reynolds, is it enough that he is a fair shaker rather than a "piece-of-the-pie" devotee?

Surely, the Administration's commitment to a race- and gender-neutral civil rights policy falls comfortably within the mainstream of American legal doctrine and political life. The Constitution generally embraces the fair shake vision, even if the Supreme Court has allowed certain exceptions. And the Supreme Court has never held that racial or sexual entitlements are constitutionally mandated. In certain remedial situations, largely in the unique area of school desegregation, the Court has authorized race-conscious remedies because of the ongoing effect of a defendant's past discriminatory conduct on identifiable present-day victims.

As a matter of constitutional law, a finding of discriminatory intent is a prerequisite to a holding of unconstitutional race or sex discrimination. Where such discrimination is found, make-whole remedies for identifiable victims are appropriate, even at the expense of other innocent victims.

The traditional fair shake civil rights view is one that the Reagan Administration has embraced since it took office. The Administration viewpoint was put to the test of the ballot box, and President Reagan was re-elected handsomely last Fall. The Administration's position has support in fundamental civil rights legislation, in decisions of the Supreme Court, and among many academics. This is not to gainsay that there are countervailing examples, provisions, viewpoints, and crosscurrents. The Administration's position, however, as reflected by Mr. Reynolds' conduct, falls well within the conceptual boundaries of appropriate adherence to a valid and traditional civil rights approach. His views and conduct are compatible with faithful execution of those policies.

Accordingly, since they are in accordance with and faithfully execute an appropriate vision of the mission of civil rights laws, Mr. Reynolds' civil rights policies cannot legitimate a vote against his confirmation. It is the responsibility of the Administration and federal enforcement officials to select cases for enforcement and to determine the proper scope of remedy to be sought. Surely an Administration has the authority to pursue and implement its civil rights vision when that policy comports with a widely accepted set of civil rights principles, even if that entails altering policy approaches adopted in other Administrations that held blurred or different visions. Fundamental principles of democracy and electoral accountability demand such freedom for an Administration.

Failure to confirm Mr. Reynolds on the grounds that he pursued the fair shake rather than the fair share civil rights vision would be inappropriate and would seriously intrude on the ability of an Administration to staff its key high-level policy posts with persons committed to Administration policies.

The CHAIRMAN. Mr. William Van Alstyne, professor of law, Duke University School of Law, we will be pleased to hear from you.

STATEMENT OF WILLIAM VAN ALSTYNE

Professor VAN ALSTYNE. Thank you, Mr. Chairman.

My background to appear here is in two parts. Part of it is purely professional, as a professor of constitutional law, and as one who has participated in civil rights litigation, indeed beginning as a staff attorney of the Civil Rights Division in 1958, when it was much more of an infant division than it is now.

What drew me to that position as a student from the Stanford Law School, where Professor Neal was at the time, was a private commitment to the ending of racial discrimination in the United States. I have tried to keep with that position in the ensuing 30 years.

I have written a great deal about civil rights, and I have participated in litigation on the plaintiffs' side. My last appearance before a congressional committee was on the House side, before Mr. Conyers' committee, to encourage the Civil Rights Division to convoke a grand jury for further action over the slaying of certain demonstrators in Greensboro. That grand jury was convoked; the longest criminal civil rights prosecution in the history of the United States ensued. I was persuaded by the integrity of the trial, though privately grieved with the acquittal of the accused. Nonetheless, it seemed to me to have been vigorously prosecuted and fairly maintained.

In 3 minutes, it is not possible to try to address the variety of specific objections that I have heard and read of, addressed to Mr. Reynolds' record. The best expression of those objections, however, I want to suggest to the committee for the record, can be found in a very professional summary of those objections that you will be receiving later today from the lawyers' committee on Civil Rights.

On the other hand, I have had the opportunity also, Mr. Chairman, very recently, to see a draft response, point by point, prepared by Mr. Reynolds, to those things. I hope the members of the committee who have any tolerance for fairness will indeed look at both those documents. Among the variety of materials you will be receiving, they seem to me the two most professional and competent. I am quite satisfied personally and professionally that the response which is being tendered by the Assistant Attorney General meets accurately and truthfully virtually every objection which tentatively troubled me on the basis of reports I had seen in the press.

Beyond that, it seems to me that there is just one issue—that generally, there is, as was implied in Mr. Blumstein's more ornate remarks, a fundamental difference as to what shall be the basic civil rights policy of the United States. My best impression, in terms of the question that Senator Simon was raising a moment ago with another Member of Congress, was that the message that the Administration seeks now to give is that there shall indeed be uniform and vigorous enforcement of civil rights in behalf of all persons in the United States and without racial discrimination.

The difference which characterizes many of the groups which will be appearing in opposition to this nomination is their own view that civil rights for some cannot be significantly advanced unless there is racial discrimination against others for the short term.

My impression is that the administration resists that belief, and regards it as fundamentally divisive of the people of the United States, and that the administration believes racial progress can be made without racial discrimination.

I share that commitment and believe that it has overwhelmingly characterized the majority of laws adopted by this Congress. My impression, however, is also that to the extent this Congress demands racial discrimination under law, either in departments of government or by private parties, however unwilling they may morally be, Mr. Reynolds is perfectly prepared to enforce the commands of Congress to require racial discrimination as one device to help particular groups; but that he will do so only when the political responsibility has been appropriately accepted by this Congress, that that is to be the future of civil rights in the United States.

That is not a kind of divisive future which I believe the overwhelming majority of Americans believe to be appropriate. I believe the administration's efforts to make progress in civil rights by means that do not involve racial discrimination against other human beings should be given a fair opportunity. Since I do not know of any appropriate professional objections to Mr. Reynolds' appointment, I therefore recommend his confirmation by this committee and by the Senate.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you for your presentation.

Mr. Paul Kamenar, executive legal director, Washington Legal Foundation.

STATEMENT OF PAUL D. KAMENAR

Mr. KAMENAR. Thank you, Mr. Chairman.

I am Paul D. Kamenar, executive legal director of the Washington Legal Foundation. I am also an adjunct professor of law at the Georgetown University Law Center. Our foundation is a nonprofit public-interest law center, with 85,000 members nationwide, engaged in a variety of legal actions before the courts and agencies dealing with constitutional law, individual and human rights, criminal justice reform, and the advocation of the rights of crime victims.

Our foundation has been actively involved in civil rights issues and cases, including the filing of an amicus brief in the landmark *Memphis Firefighters* v. *Stotts* case. In addition, we have recently published a monograph authored by Prof. Herman Belz of the University of Maryland, with a foreword by Linda Chavez, entitled, "Affirmative Action From Kennedy to Reagan: Redefining American Equality."

We believe Mr. Reynolds is clearly qualified to be Associate Attorney General. The underlying philosophy or principles behind that positions that we have taken in our activities have also been articulated forcefully under the leadership of Mr. Reynolds. The essence of those principles is that under our Constitution and civil rights laws, classes or groups of people are not entitled to civil rights protection. Individuals are. The notion that certain groups, because of some immutable characteristic like skin color, are entitled to preferential rights and privileges by the State, is indeed a dangerous concept. History has shown the evil that governments can commit by making distinctions between classes of people based on race or religion or some other characteristic. Mr. Reynolds has made it clear that our Constitution is color-blind and that racially-divisive affirmative action quotas violate the fundamental principles of equal opportunity. These principles are morally correct and constitutionally mandated.

Mr. Reynolds has thus shown himself to be a man of principle, integrity and intelligence who will make an excellent Associate Attorney General.

Any fair-minded person reviewing the enforcement record of the Civil Rights Division would quickly come to the unassailable conclusion that the performance level of the Civil Rights Division in both the civil and criminal enforcement areas equals or exceeds that of any prior administration.

Yesterday, Senator Hatch with Mr. Reynolds went over some of the cases in the record that uphold civil rights, like the *Hishon* case and the prosecution of the Ku Klux Klan members. I will not go into the record. I think it speaks very well for itself. But I would like to say in all of his actions, Mr. Reynolds is enforcing the laws and the Constitution and promoting the policy of the Reagan administration supported by the overwhelming majority of Americans, that we are a nation committed to equal opportunity, not equal results.

I might say that Mr. Reynolds is an advocate of civil rights, civil rights for everyone. His critics are misguided, I think, by suggesting that racial discrimination should be remedied by imposing goals, timetables, and quotas, and other race-conscious remedies. In short, the critics are simply imposing one form of racism for another form of racism, a remedy forbidded by the laws and the Constitution. That is not just Mr. Reynolds' view on this issue; it is the view of the Congress through the laws and the Supreme Court.

Indeed, the Supreme Court made clear in the *Stotts* decision that the 706(g) provision remedy of title VII is that courts are without any authority under that section to order any remedy that goes beyond make-whole relief for actual victims of discrimination. I would like to quote Senator Hubert Humphrey, the floor manager of the Civil Rights Act of 1964, when he assured his colleagues during consideration of title VII. He said, and I quote: "Contrary to the allegations of some opponents of this title, there is nothing in it that would give any power to the Commission or to any court to require hiring, firing, or promotion of employees in order to meet a racial 'quota' or to achieve a certain racial balance. That bugaboo has been brought up a dozen times, but it is nonexistent." End quote.

Unfortunately, that bugaboo has been around with us for the last 20 years and has become all too real. The Reagan administration and Brad Reynolds are not retreating on civil rights. They are restoring it back to its true purpose.

In conclusion, I would say that Mr. Reynolds' record clearly demonstrates a strong, principled conviction to enforce our civil rights laws without any distinctions or preferences based on race, sex, or religion, or any other irrelevant characteristics, as envisioned by the Constitution, the Congress, and the policy of our President.

Based on his record, the public interest will be clearly served by his position as Associate Attorney General of the United States.

Thank you very much, Mr. Chairman.

The CHAIRMAN. I want to thank you, Mr. Kamenar.

[Statement follows:].

TESTIMONY
OF
PAUL D. KAMENAR
EXECUTIVE LEGAL DIRECTOR
OF THE
WASHINGTON LEGAL FOUNDATION

MR. CHAIRMAN AND COMMITTEE MEMBERS, I AM PAUL D. KAMENAR, EXECUTIVE LEGAL DIRECTOR OF THE WASHINGTON LEGAL FOUNDATION. WLF IS A NONPROFIT PUBLIC INTEREST LAW CENTER WITH 85,000 MEMBERS NATIONWIDE THAT ENGAGES IN A WIDE VARIETY OF LEGAL ACTIONS BEFORE THE COURTS AND AGENCIES DEALING WITH CONSTITUTIONAL ISSUES, INDIVIDUAL AND HUMAN RIGHTS, CRIMINAL JUSTICE REFORM, AND THE ADVOCATION OF THE RIGHTS OF CRIME VICTIMS. WE ARE CURRENTLY REPRESENTING 35 DEMOCRATIC AND REPUBLICAN SENATORS AND CONGRESSMEN IN A LAWSUIT TO STOP THE ILLEGAL IMPORTATION OF GOODS INTO THE UNITED STATES FROM THE SOVIET UNION MADE BY FORCED OR SLAVE LABOR.

OUR FOUNDATION HAS BEEN ACTIVELY INVOLVED IN CIVIL RIGHTS ISSUES AND CASES, INCLUDING THE FILING AN AMICUS CURIAE BRIEF IN THE LANDMARK MEMPHIS FIREFIGHTERS V. STOTTS CASE. IN ADDITION, WE HAVE RECENTLY PUBLISHED A MONOGRAPH AUTHORED BY PROFESSOR HERMAN BELZ OF MARYLAND, WITH A FOREWORD BY LINDA CHAVEZ, ENTITLED AFFIRMATIVE ACTION FROM KENNEDY TO REAGAN: REDEFINING AMERICAN EQUALITY. WE HAVE PUBLICLY DEBATED JACK GREENBERG OF THE NAACP LEGAL DEFENSE FUND AND OTHERS ON THESE IMPORTANT CIVIL RIGHTS QUESTIONS.

THANK YOU FOR THE OPPORTUNITY TO PRESENT OUR VIEWS CONCERNING THE QUALIFICATIONS OF WILLIAM BRADFORD REYNOLDS TO BE ASSOCIATE ATTORNEY GENERAL. THE UNDERLYING PHILOSOPHY OR PRINCIPLES BEHIND THE POSITIONS WE HAVE TAKEN IN OUR ACTIVITIES HAVE BEEN ARTICULATED FORCEFULLY UNDER THE LEADERSHIP OF WILLIAM BRADFORD REYNOLDS, ASSISTANT ATTORNEY GENERAL OF THE CIVIL RIGHTS DIVISION. THE ESSENCE OF THOSE PRINCIPLES IS THAT UNDER OUR CONSTITUTION AND CIVIL RIGHTS LAWS, CLASSES OR GROUPS OF PEOPLE ARE NOT ENTITLED TO CIVIL RIGHTS PROTECTION, INDIVIDUALS ARE. THE

NOTION THAT CERTAIN GROUPS, BECAUSE OF SOME IMMUTABLE CHARACTERISTIC LIKE SKIN COLOR, ARE ENTITLED TO PREFERENTIAL RIGHTS AND PRIVILEGES BY THE STATE IS A DANGEROUS CONCEPT. HISTORY HAS SHOWN THE EVIL THAT GOVERNMENTS CAN COMMIT BY MAKING DISTINCTIONS BETWEEN CLASSES OF PEOPLE. MR. REYNOLDS HAS MADE IT CLEAR THAT OUR CONSTITUTION IS COLOR-BLIND AND THAT RACIALLY DIVISIVE AFFIRMATIVE ACTION QUOTAS VIOLATE THE FUNDAMENTAL PRINCIPLES OF EQUAL OPPORTUNITY. THESE PRINCIPLES ARE MORALLY CORRECT AND CONSTITUTIONALLY MANDATED. MR. REYNOLDS HAS THUS SHOWN HIMSELF TO BE A MAN OF PRINCIPLE, INTEGRITY, AND INTELLIGENCE WHO WILL MAKE AN EXCELLENT ASSOCIATE ATTORNEY GENERAL.

THE CIVIL RIGHTS RECORD OF THE JUSTICE DEPARTMENT UNDER THE LEADERSHIP OF MR. REYNOLDS HAS BEEN EXCEPTIONAL. MR. REYNOLDS HAS VIGOROUSLY ENFORCED THE CIVIL RIGHTS LAWS AS WRITTEN BY CONGRESS AND GUIDED BY CONSTITUTIONAL PRINCIPLES RATHER THAN AS INTERPRETED BY SOME OF HIS CRITICS WHO TRY TO IMPOSE THEIR OWN SOCIAL AGENDA ON AMERICAN SOCIETY. ANY FAIR-MINDED PERSON REVIEWING THE ENFORCEMENT RECORD OF THE CIVIL RIGHTS DIVISION WOULD QUICKLY COME TO THE UNASSAILABLE CONCLUSION THAT THE PERFORMANCE LEVEL OF THE CIVIL RIGHTS DIVISION EQUALS OR EXCEEDS THAT OF PRIOR ADMINISTRATIONS. WHERE ACTUAL INSTANCES OF DISCRIMINATION HAVE OCCURRED, MR. REYNOLDS HAS BEEN FORCEFUL IN BRINGING EFFECTIVE ACTION AGAINST THOSE WHO VIOLATE THE LAW.

FOR EXAMPLE, THE CIVIL RIGHTS DIVISION HAS OBTAINED A RECORD NUMBER OF INDICTMENTS AND CONVICTIONS IN CASES INVOLVING RACIALLY MOTIVATED ACTS OF VIOLENCE, INCLUDING POLICE BRUTALITY IN NEW ORLEANS AND KU KLUX KLAN ACTIVITY IN GREENSBORO, NORTH CAROLINA, MOBILE, ALABAMA, AND SEVERAL LOCALITIES IN THE STATE OF GEORGIA. IN FACT, THE DIVISION'S RECORD OF PROSECUTION UNDER THE CRIMINAL CIVIL RIGHTS LAWS EXCEEDS THAT OF ANY PRIOR ADMINISTRATION IN HISTORY, AND FOR THE FISCAL YEAR THAT JUST ENDED, AGAIN HAD AN INCREASE IN THE NUMBER OF CASES PURSUED BY THE DIVISION INVOLVING RACIAL VIOLENCE.

OTHER EFFECTIVE ENFORCEMENT MEASURES UNDER THE LEADERSHIP OF BRAD REYNOLDS INCLUDE

- FILING 53 EMPLOYMENT DISCRIMINATION SUITS (COMPARED TO 51 BY THE CARTER ADMINISTRATION, OF WHICH 10 WERE AMICUS CURIAE)
- FILED 110 REJECTIONS TO REDISTRICTING PLANS (COMPARED TO 26 BY THE CARTER ADMINISTRATION)
- FILED AN AVERAGE OF 21.75 HOUSE DISCRIMINATION CASES PER YEAR (COMPARED TO 16.5 CASES PER YEAR BY THE CARTER ADMINISTRATION)

MR. REYNOLDS HAS ALSO DONE AN EXCELLENT JOB IN ENFORCING THE CIVIL RIGHTS FOR INSTITUTIONALIZED PERSONS ACT WHICH PROTECTS THOSE CONFINED TO INSTITUTIONS SUCH AS MENTAL HOSPITALS AND JUVENILE DETENTION CENTERS FROM UNCONSTITUTIONAL CONDITIONS OF CONFINEMENT. IN THESE CASES, MR. REYNOLDS IS GETTING QUICK RESULTS IN THESE CASES BY DIRECT NEGOTIATION AS CONGRESS INTENDED RATHER THAN THE LENGTHY, CONFRONTATIONAL APPROACH OF LITIGATION.

HIS DIVISION HAS FILED SUIT AGAINST THE STARRETT CITY HOUSING PROJECT IN NEW YORK WHICH, IN THE GUISE OF IMPOSING RACIAL QUOTAS, KEEPS MINORITIES FROM LIVING WHERE THEY DESIRE. HE HAS CORRECTLY OPPOSED COURT ORDERED FORCED BUSING WHICH HAS HAD A DEVASTATING EFFECT ON OUR COMMUNITIES AND OUR CHILDREN'S EDUCATION, AND WHICH IS OPPOSED BY MINORITIES AS WELL.

IN ALL OF HIS ACTIONS, MR. REYNOLDS IS IMPLEMENTING THE LAWS AND PROMOTING THE POLICY OF THE REAGAN ADMINISTRATION SUPPORTED BY AN OVERWHELMING MAJORITY OF AMERICANS -- THAT WE ARE A NATION COMMITTED TO EQUAL OPPORTUNITY, NOT EQUAL RESULTS.

HIS CRITICS ARE MISGUIDED BY SUGGESTING THAT RACIAL DISCRIMINATION SHOULD BE REMEDIED BY IMPOSING GOALS, TIMETABLES, QUOTAS, AND OTHER RACE-CONSCIOUS REMEDIES. IN SHORT, THE CRITICS ARE SIMPLY IMPOSING RACISM TO COMBAT RACISM, A REMEDY FORBIDDED BY THE LAWS AND CONSTITUTION.

AS THE SUPREME COURT MADE CLEAR IN THE STOTTS DECISION, FEDERAL COURTS ARE WITHOUT ANY AUTHORITY UNDER SECTION 706(g) -- THE REMEDIAL PROVISION OF TITLE VII -- TO ORDER ANY REMEDY THAT GOES BEYOND "MAKE WHOLE" RELIEF FOR ACTUAL VICTIMS OF DISCRIMINATION. MR. REYNOLDS IS CORRECT IN NOTING THAT THE SUPREME COURT DID NOT LIMIT ITS RULING TO SITUATIONS OF LAY-OFFS ONLY, BUT ALSO IN THE CONTEXT OF HIRING, FIRING, AND PROMOTIONS. AS SENATOR HUBERT HUMPHREY, A FLOOR MANAGER OF BILL ASSURED HIS COLLEAGUES DURING CONSIDERATION OF TITLE VII:

> CONTRARY TO THE ALLEGATIONS OF SOME OPPONENTS OF THIS TITLE, THERE IS NOTHING IN IT THAT WILL GIVE ANY POWER TO THE COMMISSION OR TO ANY COURT TO REQUIRE HIRING, FIRING, OR PROMOTION OF EMPLOYEES IN ORDER TO MEET A RACIAL "QUOTA" OR TO ACHIEVE A CERTAIN RACIAL BALANCE....THAT BUGABOO HAS BEEN BROUGHT UP A DOZEN TIMES; BUT IS NONEXISTENT.

WHILE A FEW LOWER FEDERAL COURTS HAVE INSISTED ON STICKING TO THEIR OLD WAYS AFTER STOTTS BY ALLOWING QUOTAS TO CONTINUE, MR. REYNOLDS HAS TAKEN THE LEADERSHIP IN IMPLEMENTING THE CLEAR MESSAGE IN STOTTS: QUOTAS ARE UNLAWFUL, BUT THAT ACTUAL VICTIMS OF DISCRIMINATION WILL BE MADE WHOLE. IN ADDITION, VIOLATORS MAY EVEN BE REQUIRED TO SEEK OUT QUALIFIED PERSONS FOR EMPLOYMENT OPPORTUNITIES IN THE RELEVANT LABOR MARKET. IN THIS FASHION, QUOTAS WILL NOT BE USED TO DISCRIMINATE AGAINST INNOCENT NONMINORITIES, NOR CAN QUOTAS BE USED AS AN EXCUSE TO DISCRIMINATE AGAINST MINORITIES BY THOSE WHO CLAIM TO HAVE SATISFIED SOME ARBITRARY QUOTA AND THEREBY PUT A "CAP" ON MINORITY HIRING. AS PROFESSOR ALEXANDER BICKEL STATED:

> [A] RACIAL QUOTA DEROGATES THE HUMAN DIGNITY AND INDIVIDUALITY OF ALL TO WHOM IT IS APPLIED; IT IS INVIDIOUS IN PRINCIPAL AS WELL AS IN PRACTICE. MOREOVER, IT CAN AS EASILY BE TURNED AGAINST THOSE IT PURPORTS TO HELP. THIS HISTORY OF THE RACIAL QUOTA IS A HISTORY OF SUBJUGATION, NOT BENEFICENCE. ITS EVIL LIES NOT IN ITS NAME BUT IN ITS EFFECTS; A QUOTA IS A DIVIDER OF SOCIETY, A CREATOR OF CASTES, AND IT IS ALL THE WORSE FOR ITS RACIAL BASE, ESPECIALLY IN A SOCIETY DESPERATELY STRIVING FOR AN EQUALITY THAT WILL MAKE RACE IRRELEVANT.

A. BICKEL, THE MORALITY OF CONSENT 133 (1975).

WILLIAM BRADFORD REYNOLDS' RECORD CLEARLY DEMONSTRATES A

STRONG, PRINCIPLED CONVICTION TO ENFORCE OUR CIVIL RIGHTS LAWS WITHOUT DISTINCTIONS OR PREFERENCES BASED ON RACE, SEX, RELIGION, OR ANY OTHER IRRELEVANT CHARACTERISTIC, AS ENVISAGED BY THE CONSTITUTION, THE CONGRESS, AND THE POLICY OF OUR PRESIDENT. BASED ON HIS EXEMPLARY RECORD, THE PUBLIC INTEREST WILL BE CLEARLY SERVED BY HIS POSITION AS ASSOCIATE ATTORNEY GENERAL OF THE UNITED STATES.

THANK YOU FOR THE OPPORTUNITY TO PRESENT THESE REMARKS.

The CHAIRMAN. Now, as I understand, all of you, each of you, from what you have said here, endorse Mr. Reynolds to be Associate Attorney General; is that correct—I will ask each one of you. Mr. Neal?

Mr. NEAL. That is certainly correct, Senator Thurmond.

The CHAIRMAN. Professor Blumstein?

Professor BLUMSTEIN. Yes, sir.

The CHAIRMAN. Professor Van Alstyne?

Professor VAN ALSTYNE. Yes, sir.

The CHAIRMAN. Mr. Kamenar?

Mr. KAMENAR. Yes, sir.

The CHAIRMAN. I do not believe there are any questions. I want to express my appreciation to you gentlemen for your presence here and thank you for coming and testifying.

You are now excused.

The next panel is panel 2.

We had Mr. Barr down here, and I notice he has been stricken.

Mr. Hooks, the chairman of the Leadership Conference on Civil Rights; Mr. William Taylor, director, Center for National Policy Review; Ms. Judy Goldsmith, president of the National Organization for Women; Richard P. Fajardo, acting associate counsel, Mexican American Legal Defense and Educational Fund; Ms. Kathy Wilson, national chair, National Women's Political Caucus; and Mr. John Jacob, president, National Urban League; and Mr. Eric Snapper, the Legal Defense Fund.

Now, as I understand, Mr. Barr is not here; Ms. Goldsmith is not here, and Ms. Kathy Wilson is not here at this time.

If you will all stand, raise your right hands, and be sworn. Do you swear that the testimony you will give in this hearing will be the truth, the whole truth, and nothing but the truth, so help you, God?

[Witnesses respond in the affirmative.]

The CHAIRMAN. Thank you, and please be seated.

Mr. Hooks, we can start with you, I believe. You may proceed. Watch the lights here, and we will put your full statement in the record, if you wish.

TESTIMONY OF A PANEL INCLUDING BENJAMIN L. HOOKS, EXECUTIVE DIRECTOR, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, WASHINGTON, DC; WILLIAM L. TAYLOR, DIRECTOR, CENTER FOR NATIONAL POLICY REVIEW, WASHINGTON, DC; RICHARD P. FAJARDO, ACTING ASSOCIATE COUNSEL, MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, WASHINGTON, DC; ERIC SNAPPER, LEGAL DEFENSE FUND; KATHY WILSON, NATIONAL CHAIR, NATIONAL WOMEN'S POLITICAL CAUCUS, WASHINGTON, DC; JUDY GOLDSMITH, PRESIDENT, NATIONAL ORGANIZATION FOR WOMEN, INC., WASHINGTON, DC; ROBERT KAPP, LAWYERS COMMITTEE FOR CIVIL RIGHTS UNDER LAW, WASHINGTON, DC; AND JOHN E. JACOB, PRESIDENT AND CHIEF EXECUTIVE OFFICER, NATIONAL URBAN LEAGUE, NEW YORK, NY

Mr. HOOKS. Mr. Chairman and Members of the Committee, my name is Benjamin L. Hooks, and I am the executive director of the National Association for the Advancement of Colored People. The NAACP appreciates the opportunity to appear on behalf of its 2,100 units in all 50 States and the District of Columbia.

We are deeply disturbed about President Reagan's nomination of Mr. William Bradford Reynolds to be Associate Attorney General for the United States. We have had problems with him in his capacity as Assistant Attorney General responsible for the Civil Rights Division, and we find it difficult to countenance the reality that he is being nominated for an even more responsible post within the Department.

Our concern is based on the shocking fact that Mr. Reynolds and the Department of Justice are waging an unprecedented, aggressive and unnerving campaign to reverse more than two decades of well-established principles for remedying the ravages of past discrimination and for ensuring that patterns and practices of discrimination should be eliminated.

Mr. Reynolds has opposed minority set-asides. He has opposed voluntary affirmative action. He has sought to derail attempts to desegregate public schools. He has sought to minimize or eliminate civil rights by his position that whatever group membership one inherits, it carries with it no entitlement to preferential treatment, which completely misstates the whole purpose of what we are trying to do.

I know his people are talking about the fact that we are not concerned about the outcome; we are only concerned about the process. But if a plane explodes in mid-air, if a machinegun fails to fire, if a jet will not land, we are not concerned with the process by which it is made, but rather, whether it can land or fly or shoot. We are concerned in America in every area except race relations with the whole business of outcome.

Reynolds has sought to change the result standard to an intent to discriminate standard. He has gloated that the *Stotts* decision has freed him to seek in 50 jurisdictions to eliminate consent decrees in spite of the fact that four circuit courts of appeals have ruled in a different way.

We talk about the Constitution being color-blind, sex-blind, or gender-neutral—and it is our hope that someday it will be. But if the past is a guide to the present and future, then color-conscious remedies will have to be used to alleviate color-caused individual problems.

Article I, section 2, clause 3 of the Constitution took color into account and made black folk only three-fifths of a person. The 13th, 14th and 15th amendments were color-conscious attempts to remedy color-caused problems. Freeing of slaves, equal protection, and the right to vote were not needed by white men; they were needed by slaves, who were black.

The 19th amendment was sex-conscious, and not neutral, because it gave women the right to vote in Federal elections.

The 1957 Civil Rights Act, the 1964 Civil Rights Act, the 1965 Voting Rights Act, the 1968 Fair Housing Law, the 1972 Equal Opportunity Act—all were designed as color-conscious remedies to eliminate color-caused problems.

Great moral problems deserve answers. This is not the time for the man in this position to zealously defend the rights of those who are more equal against those who are less equal. Neutrality is not the answer. Sticking our heads in the sand is not the answer.

Can we as a nation be neutral on the question of slavery? Can we be neutral about lynchings, beatings, brutalities? Can we be neutral about Mussolini and his rape of Ethiopia? Can we be neutral about Hitler? Can we be neutral about apartheid in South Africa, terror in Afghanistan, brutality in Uganda? We cannot be neutral about that, and we cannot be neutral about this situation.

Members of the committee, the world is looking at you, and we ask that you do not confirm Mr. Bradford Reynolds, because to do so would be to congratulate him and to vindicate the positions he has taken, and I do not believe that that is a position that this Senate wants to take.

Thank you very much, Mr. Chairman.

The CHAIRMAN. Thank you, Mr. Hooks. We are glad to have you with us.

[Statement follows:]

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TESTIMONY OF
BENJAMIN L. HOOKS
EXECUTIVE DIRECTOR
NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE

Mr. Chairman and members of the Committee, my name is Benjamin L. Hooks and I am the Executive Director of the National Association for the Advancement of Colored People. I am accompanied today by Miss Althea T. L. Simmons, Director of our Washington Bureau.

The NAACP appreciates the opportunity to appear on behalf of its 2100 units in all 50 states and the District of Columbia.

Mr. Chairman, and members of the Committee, the NAACP is deeply disturbed by President Reagan's nomination of Mr. William Bradford Reynolds for Associate Attorney General of the United States. We must confess that we have had problems with Mr. Reynolds in his capacity as Assistant Attorney General responsible for the Civil Rights Division of the Department of Justice and we find it difficult to countenance the reality that he is being nominated for an even more responsible post within the Department.

Our concern is based on the shocking fact that Mr. Reynolds and the Department of Justice is waging an unprecedented, aggressive and unnerving campaign to reverse more than two decades of well-established principles for remedying the ravages of past discrimination and for ensuring that patterns and practices of the odious cancer of discrimination are removed from our democratic society.

From the framing of the Constitution until after the Civil War, civil rights was left solely to the states. After the Civil War, there was a legislative thrust providing a federal guarantee of racial equality. The ratification of the 13th, 14th and 15th Amendments to the Constitution were major steps in fashioning a "federal" role in the area of civil rights. The legislative branch of the government was empowered to enforce those three amendments "by appropriate action". The progress made during the Reconstruction period between 1866 and 1875 was so modified, or in the case of the Supreme Court, narrowly construed, that by 1910 it was non-existent. The position of the Supreme Court as delineated in the Slaughterhouse Cases and the Civil Rights Cases was that "the entire domain of civil rights heretofore belonging exclusively to the states" offered Federal protection against state, but not private, action. For more than 35 years, the Federal government exercised a minimal role in protecting civil rights. Although some executive action was taken during the Roosevelt Administration, President Truman took the first decisive step to articulate a role for the government in civil rights by presenting a civil rights program to the Congress in 1948 (anti-lynching, anti-transportation segregation and anti-poll tax).

The decision in Brown v. Board of Education was the catalyst for a program of civil rights legislation which began in 1956 under President Eisenhower who submitted a four-point civil rights program that called for the creation of the U. S. Commission on Civil Rights, authority for the federal government to use civil procedures to protect civil rights, broader statutes to protect voting rights and the Civil Rights Division of the U. S. Department of Justice.

For the first time since the creation of the Civil Rights Division, the Department of Justice has moved drastically from one wherein the the Department argued, as a friend of the Court, in the Brown case that state laws mandating segregated public education should be invalidated to its current position in Grove City College which was persuasive to the Supreme Court and led to the reversal of the past policy of three Presidents (Nixon, Ford and Carter) by continuing Federal funding to colleges which practice racial and/or sexual discrimination.

The Civil Rights Division of the Department of Justice has launched an all-out attack on civil rights. The Reynolds-led attack has received most notoriety for its onslaught against affirmative action, but it is also attacking national origin and gender-conscious actions in other areas, including housing, integration of institutions of higher education, increased opportunities for minority-owned businesses and school desegregation. During Mr. Reynolds tenure as chief of the Civil Rights Division he has shown no concern about what the law is, nor with enforcing the law as it has developed. In our opinion, his concern has been to attempt to reshape the law for the ideological and political purposes of the Administration.

He has publicly declared the intention of the Department to reverse even voluntary affirmative action and recently sought modification of some 51 consent decrees and to reverse laboriously-crafted Federal court orders which resulted in desegregated schools.

The systemic problem in the Civil Rights Division is the narrowing of protections and remedies afforded aggreived persons based on the doctrine of "discriminatory intent". It is apparent to us that the Division seeks discriminatory animus or purpose rather than effect to define when an act is unlawful. The position taken by Mr. Reynolds and the Department of Justice is that goals, timetables, as well as quotas, give "a gratuitous advantage", "preferential treatment" and is "sterotyping". The Division, as well as the Administration, wants remedies to apply only to identifiable victims of discrimination and argues against class actions and court-ordered modification of seniority plans.

Under Mr. Reynolds' leadership, the Civil Rights Division sent letters to more than 50 jurisdictions urging them to voluntarily modify affirmative action consent decrees to remove numerical goals and quotas. Some of the jurisdictions have indicated that they will stick by their affirmative action plans. Mr. Reynolds acted swiftly. The Justice Department went to court to modify the Indianapolis affirmative action plan although the city remains committed to the plan embodied in the consent decree because it has "had a positive effect both on the forces and in dealing with certain portions of the minority community".

In March of 1984, the Civil Rights Division challenged, as unlawful, a local ordinance creating a set-aside for minority contractors. The set-aside was created as a remedy to the voluntary finding of past and present discrimination by the local officials graphically and unfortunately illustrated by the bloody and destructive Liberty City, Florida riots.

The Division has refused, as a matter of principle, to comply with the Equal Employment Opportunity Commission's requirement for goals and timetables for Federal agencies to eliminate discrimination or issue affirmative action plans to remedy past discrimination.

In January, 1984, the Division announced its intention to challenge the holding in the American Federation of State, County and Municipal Employees v. Washington case where AFSCME successfully argued a violation of Title VII of the 1964 Civil Rights Act wherein female job classifications were paid approximately 20 percent less than male job classifications requiring comparable skills, effort and responsibility.

This Committee, nor the Congress, can forget the position of the Department of Justice in the Bob Jones University and Goldsboro Christian School cases, nor the Grove City College v. Bell case where the Department took the position that the Title IX (Education Amendments of 1972) prohibition on discrimination only covers the specific progam (the financial aid system) not the entire college. Subsequent events/information revealed that the initiative for the action taken re Bob Jones University et al was, in part, a Reynolds one.

The Reynolds initiatives have not been confined to the employment area. The NAACP, over the years, has been challenging the segregated Chicago public school system. Although the inception of the case predates Mr. Reynolds, the NAACP, representing black students, protested the agreement of Chicago and the Department of Justice to do less than the law or the consent decree requires. The Department, in 1982, during Mr. Reynolds' tenure reaffirmed its position in an "Assessment of the Chicago School Board's Comprehensive Student Assignment Plan" and declared that it was cautious[ly] optimistic that the (freedom of choice) plan would work.

Mr. Reynolds' views are not secret. They have been laid out in a series of speeches and in testimony before the Congress and although he possesses an adeptness at quoting cleverly selected portions of statements made by persons championing the cause of civil and/or equal rights, it is quite clear to the NAACp and others that the Division of Civil Rights is engaged in a carefully orchestrated attempt to roll back the clock on civil rights.

In the June 14, 1984 Washington Post, Mr. Reynolds, in speaking about the Supreme Court decision in Stotts, is reported to have declared victory in the Department's three year war against affirmative action and announced that the Department would reexamine all anti-discrimination agreements involving the government and advise other Federal civil rights agencies to do the same. The statement attributed to Mr. Reynolds said:

> I said some time ago that civil rights was at a crossroads; that we would either take the path of race conscious remedies...or the high road of race neutality...The Court has moved us off the crossroads and propelled us down the road we have been urging. It is an exhilarating decision.

Mr. Reynolds was quoted in the July 11, 1984 Washington Post as saying:

> ...the government should not be in the business of trying to bring about integration.

In testimony before the Congress in November, 1981, Mr. Reynolds announced:

> ...the Department will henceforth, on a finding by a court of de jure segregation, seek a desegregation remedy that emphasizes ['freedom of choice' plus 'separate but equal'] rather than court ordered busing.

In August, 1981, J. Clay Smith, Jr., Acting Chair of the EEOC sent a memorandum to Heads of all Federal Agencies regarding their responsibility for the development of multi-year affirmative action plans, including goals and timetables. Mr. Reynolds, a month later, without consultation with Mr. Smith, whose agency had the authority to oversee affirmative action efforts and Federal workforce EEO, wrote Mr. Smith and other agencies on the same day stating that the Department of Justice:

> is unable to conclude at present that there is statutory authority for compelling the use of goals and timetables in affirmative action planning.

The NAACP has been unable to ascertain whether or not the Department of Justice, has to this day, concluded that there is statutory authority for such action. The implied challenge of the authority of the EEOC without further action certainly leaves Federal agencies in a state of flux re what to do in the light of what appears to be conflicting directives by two governmental agencies.

Mr. Reynolds has been cavalier in his interpretation of the law. In explaining his and the Administration's opposition to affirmative action and speaking to the issue of remedying "the effects of past discrimination stated:

> Justice Jackson's admonition in Korematsu... is no longer merely prophetic: an urgent need has been pressed and those intent on finding a quick fix, rather than a lasting solution, have reached for the loaded weapon--the so-called remedial use of racial discrimination.

Mr. Chairman and members of this committee, the NAACP is of the opinion that a 300 year quest for equal opportunity can not accurately nor morally be called a "quick fix". The Assistant Attorney General's over-simplification of race relations is evident in his Amherst speech in April, 1983 when he states that:

> We are all--each of us--a minority of one. Our rights derive from the uniquely American belief in the primacy of the individual. And in no instance should an individual's rights rise any higher or fall any lower than the rights of others because of race. Whatever group membership one inherits, it carries with it no entitlement to preferential treatment over those not similarly

> endowed with the same immutable characteristics-- Any compromise of this principle is discrimination, plain and simple and such behavior is no more tolerable when employed remedially, in the name of 'affirmative action' to bestow a gratuitous advantage on members of a particular group than when it is divorced from such beneficence and for the most pernicious of reasons works to one's disadvantage.

Mr. Chairman, and members of the Committee, we recited at the beginning of this testimony some history regarding what happened to members of the black race immediately after Reconstruction which deprived them of civil rights for almost a century. We perceive a pattern emerging that bears some similarity to that dark period when progress was so modified as to be almost non-existent. It is the NAACP's considered opinion that Mr. Reynolds' interpretation of the Constitution, his positing of legal theories that would lock "protected classes" into a status quo position with his theory of "inherited group membership," "race neutrality" and his anti-affirmative action stance.

"Civil rights: is a deep felt commitment and realization in any truly free and democratic nation. The historical failure to impartially administerr civil rights laws regardless to race, sex and other ascriptive characteristics has simultaneously flawed American democracy and created the plight of black and other deprived Americans. Civil rights laws must be enforced to guarantee even minimal equality of opportunity. It is troubling to the NAACP that a person whose record shows that he is not committed to nor working to ensure the rights of those he has sworn to protect.

The Leadership Conference on Civil Rights report, Without Justice (a report on the conduct of the Justice Department in 1981-82) is still a viable source document and points out the failings of the Justice Department where civil rights is concerned.

The NAACP urges this Committee to vote against the confirmation of Mr. William Bradford Reynolds based on the record he has made during his tenure as Assistant Attorney General which has been shocking and alarming. The excesses revealed in even a cursory examination of his stewardship should be of grave concern not just to black people, Hispanic Americans, women, handicapped people and others who have been victimized by discrimination, but to all Americans who cherish the Constitution and the system of ordered liberty it has created.

The NAACP refutes Mr. Reynolds' position that:

- a misplaced emphasis on school segregation has led to a neglect of educational quality;
- that magnet schools will desegregate the nation's public schools;
- volunteer programs of school desegretation will work
- court-ordered busing has been counter-productive
- the confining of the Department's requests for relief in employment discrimination to injunctive relief, increased recruitment efforts and limited back-pay awards will resolve the endemic problem of racial/ sexual discrimination in employment
- the Department may wilfully ignore judicial decisions that fail to meet the Department's apparent pre-determined criteria
- the Department has been diligent in enforcing the Voting Rights Act

Mr. Chairman, and members of the Committee, time limitations will not permit a more extensive recital of the actions of Mr. Reynolds and the Department of Justice. Suffice it to say, the NAACP believes that our nation will be ill-served if Mr. Reynolds is confirmed as Associate Attorney General, with oversight functions for civil rights.

Thank you for this opportunity to express the NAACP's views.

The CHAIRMAN. Our next witness is Mr. William Taylor. Mr. Taylor, we would be glad to hear from you.

STATEMENT OF WILLIAM L. TAYLOR

Mr. TAYLOR. Thank you, Mr. Chairman.

Let me start by saying a few words about the standards by which I think this nomination should be judged by the Senate.

This is not a debate about whether or not the nominee went to a good law school, or whether he was associated with a prestigious law firm, or whether he can write a legal brief. Those in themselves are not sufficient qualifications for the office that he seeks.

On the other hand, this is not a debate about differences in policy. If the only question were differences in the policy of Mr. Reynolds and the civil rights groups, I would not be here testifying in opposition.

The standard by which this nomination should be judged, and all other nominations to the Justice Department and other Federal agencies, is the willingness of the nominee to uphold the law. And I might add that I think special scrutiny is warranted where you have a Justice Department nomination at stake.

Abraham Lincoln's Attorney General, Edward Bates, said that it was his duty, above all the other ministers of state, to uphold the law. And when you judge it by that standard, and judge it against the record of 4 years, I think you have to conclude that the nominee is not qualified to hold the position which he seeks.

I think there are several counts, and I will only have a chance to state those counts, rather than the evidence for them, that disqualify him for the nomination.

First, the nominee has repeatedly flouted the will of Congress as expressed in the civil rights laws, and the examples are legion: The *Gingles* case under the Voting Rights Act; the *Bob Jones* case, and numerous other instances of refusing to follow both the letter and the spirit of the Civil Rights Act of 1964.

And I might say that I would like, if I have a chance in questioning, to deal with some misrepresentations that Mr. Reynolds made in the course of his testimony over the last 2 days that are not in my written statement.

Second, the nominee has refused to acknowledge that the role of the Supreme Court is paramount to that of the executive branch in interpreting the Constitution and laws of the United States. He has done that in education cases. He has done that in cases involving affirmative remedies under the law.

Third, he has attempted to override the will of local officials and employers who were seeking to comply with the civil rights laws. The nominee talks about local control, but he is only in favor of local control where officials are opposing the remedies provided under the civil rights laws. Where they favor such remedies, he is quite willing to override them.

Fourth, the nominee has helped to create a climate which fosters the reemergence of racial bias in this country. He has heaped praise on a group that has obstructed court orders, while telling them that he condemns the courts for their actions in certain areas of the law.

And fifth, he has permitted and participated in political intrusions on the fair enforcement of the laws.

Now, let me say in concluding this opening statement a word about what I think is the significance of the vote on this nomination. Congress did not have a vote when the nominee decided that Supreme Court decisions in the field of education were unworthy of respect and that he would not follow them. Congress did not have a vote when the nominee decided to disregard several Supreme Court decisions on affirmative action, to distort another decision, the *Stotts* case, and to use that as the basis for overriding court decrees and contractual obligations in at least 50 communities around this Nation.

You did not have a vote when the nominee decided that all of the work that Congress had put into carefully setting out the responsibilities under the Voting Rights Act counted for nothing against his own personal preferences. But you do have a vote now. And the issue is whether to reward someone who has exhibited such manifest and massive disrespect for law with an elevation to higher office in a department that is chiefly responsible for faithfully executing the laws.

If you vote to confirm under these circumstances, your vote will have consequence. Civil rights groups are under attack in some quarters for relying too much on law to establish opportunity for the people we represent. If you vote to confirm, you will be sending a message that the Senate does not attach importance to its own civil rights laws and that people cannot rely on them. That will do harm not just to minorities, disabled people and women—but to all of us.

READEX FICHE

If you vote to confirm, the Senate will be tearing a gaping hole in the rule of law. You will be making it easier in the future for people who lack respect for law to hold positions of reponsibility in the Justice Department.

But, I believe if each Senator examines the record of this nominee, you will vote to defeat the nomination.

The CHAIRMAN. Your time is up. We will include the balance of your statement in the record.

Mr. TAYLOR. Thank you.

[Statement follows:]

Statement by

William L. Taylor
Director
Center for National Policy Review

Outline and Summary of Testimony of William L. Taylor

I. Introduction

The appropriate standard for deciding on confirmation of Presidential nominees to positions in the Department of Justice: while deference should be given to the President in selecting officials for the Executive branch, nominees must meet basic standards, including a demonstrated willingness to uphold the Constitution and laws of the United States. Insistence on this standard is particularly crucial in nominations for positions in the Department of Justice because of the central role of the Department in our legal system.

Mr. Reynolds' record over four years in administering the federal civil rights laws demonstrates a clear unwillingness to uphold the law.

II. The Nominee Has Flouted the Will of Congress on Numerous Occasions

A. Voting. He is asserting in the Supreme Court positions directly contrary to those adopted by Congress in adopting the Voting Rights Amendments of 1982. Thornburg v. Gingles, No. 83-1968. The claims now made were asserted by the Administration in the Congressional debate and explicitly rejected by Congress.

B. Tax Exemptions for Discriminatory Schools. Mr. Reynolds played a leading role in the effort by the Reagan Administration to repudiate prior executive policy and previous court decisions and to thwart the will of Congress in order to grant tax exempt status to schools that discriminate on the basis of race. Despite the effort of the Justice Department to render the case moot by changing its position in the Supreme Court, the Court decisively rejected the argument of the Department in favor of conferring tax benefits on such discriminatory institutions. Bob Jones University v. United States, 461 U.S. 574 (1983).

C. Affirmative Remedies Under Civil Rights Laws. The enactment of the Civil Rights Act of 1964 proceeded from an understanding of the history of discriminatory practices against minorities and sought to afford affirmative remedies to remove these barriers to full participation in society. While particular remedies have sometimes proved controversial, actions of both Democratic and Republican Administrations since 1964 and further legislation in Congress have proceeded on a common understanding that the objective was to achieve true, not merely formal, equality of opportunity. In his efforts across the board--in education, employment, housing and voting--to restrict or eliminate affirmative remedies for discrimination, Mr. Reynolds has sought to deny the history and objectives of the civil rights laws.

III. The Nominee Has Repeatedly Refused to Acknowledge That the Role of the Supreme Court is Paramount to That of the Executive Branch in Interpreting the Constitution and Laws of the United States

Ever since the Supreme Court's decision in 1803 in Marbury v. Madison that "it is emphatically the province and duty of the judicial department to say what the law is", the Court has been accepted as the final arbiter in determining the meaning of the Constitution and laws. Yet the nominee has repudiated the Supreme Court's decisions in several critical areas of the law.

A. School Desegregation. The Supreme Court has held that voluntarism on the part of parents is not a constitutionally adequate means of redressing the denials of rights caused by deliberately segregated school systems and that appropriate remedies must include the use of mandatory reassignment and pupil transportation. Green v. County School Board of New Kent County, 391 U.S. 430, 441 (1968); Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 29 (1971). Yet the nominee, in clear defiance of these decisions, has repeatedly stated that the Justice Department will not employ any means other than voluntary parental choice to remedy unconstitutional school segregation. See House Judiciary Committee Hearings on School Desegregation, 97th Cong., 1st Sess., November, 1981, pp. 631-632.

Mr. Reynolds has put this policy into practice by entering into consent decrees with school districts calling for the remedying of racially dual school systems solely through voluntary techniques (such as magnet schools) and absolving the districts of further responsibility even if no effective desegregation is achieved. Consent Decree, U. S. v. Bakersfield City School District (E.D. Cal. 1984); Consent Decree, U. S. v. Board of Education for the Lima City School District (No. C-80-723, N.D. Ohio 1984). He has also opposed the entry of a consent decree in St. Louis, agreed to by plaintiffs and twenty-three school districts, that relied on voluntary techniques, because the decree provided further measures if voluntarism proved ineffective. Brief of the U. S. on Proposed Settlement Agreement in Liddell v. Board of Education (E.D. Mo., filed April 27, 1983) pp. 4-5.

Mr. Reynolds' policies as reflected in these cases and in the Department's failure to take action elsewhere to remedy unconstitutional segregation reflect an adherence to the "separate but equal" doctrine repudiated by the Supreme Court in Brown v. Board of Education.

In addition, the nominee has sought to limit remedies by repudiating the presumption established in the Keyes case that when deliberate segregation is proved in a substantial portion of a school district, segregation elsewhere in the district is attributable to deliberate acts of school officials. Keyes v. School District No. 1 of Denver, Colorado, 413 U.S. 189, 202 (1973). He announced to a Congressional committee in 1981 that he would not use the presumption, but would instead seek to limit remedy to schools in which segregative acts are proven directly. November, 1981 Hearings, p. 618.

While working to narrow or eliminate the remedies available to persons denied constitutional rights (the class he is charged by law to protect), the nominee has sought to hinder their participation in proceedings to assert their own rights. Thus, he opposed the intervention of black parents represented by the NAACP Legal Defense Fund in a Charleston, South Carolina school case. U.S. v. Charleston County Consolidated School District, C.A. No. 81-50-8, U. S. Response to Petition for Intervention, p. 3. According to an associate, Mr. Reynolds instructed lawyers to make "those bastards...jump through every hoop" before allowing them to intervene. Washington Post, October 22, 1983, p. A3. In other cases, such as Bakersfield and Lima, Mr. Reynolds has simply secured the entry of consent decrees without any notice to the victims of discrimination.

B. Affirmative Remedies. The nominee has effectively repudiated several Supreme Court decisions upholding the use of race conscious remedies where deemed necessary by Congress, the courts or private parties to redress the effects of past discrimination or to break down old patterns of racial segregation. Regents of the University of California v. Bakke, 438 U.S. 265 (1978); United Steelworkers of America v. Weber, 443 U.S. 193 (1979); Fullilove v. Klutznick, 448 U.S. 448 (1980). Mr. Reynolds has repeatedly exhibited his disrespect for these decision not only in words (see, e.g., Remarks before the University of Virginia Student Legal Forum, October 5, 1983), but in action.

After denouncing Weber as wrongly decided and declaring he would do everything possible to have the decision overturned (Wall Street Journal, December 8, 1981, p. 4), the nominee has treated the case as if it had never been decided. For example, he intervened in a New Orleans case to oppose implementation of an agreement that black police officers and city officials had reached to redress past patterns of exclusion and segregation. His position was rejected by the Court of Appeals. Williams v. New Orleans, 729 F.2d 1554 (5th Cir. 1984).

Over the past year, Mr. Reynolds has mounted a campaign to undo affirmative remedies based on a blatant misconstruction of the Supreme Court's decision in Firefighters Local Union No. 1784 v. Stotts, 104 S.Ct. 2576 (1984). Although Stotts dealt only with whether affirmative action remedies could override seniority in layoff situations, Mr. Reynolds has misapplied it to attack affirmative remedies in hiring and promotion. He has treated Bakke and Weber as overruled by Stotts although the Supreme Court indicated no such intention. He has been undeterred by the fact that every one of the five federal courts of appeals that have considered the question has rejected his interpretations.

In his zeal to overturn and misapply Supreme Court decisions, the nominee has flouted other well established rules of law and federal procedure. The Department of Justice is proceeding with a motion to strip a consent decree in Buffalo of goals and timetables provisions despite its concession that a ruling of the Second Circuit precludes the Department's interpretation. EEOC v. Local 638, Sheet Metal Workers, 753 F.2d 1172, 1185-86 (2d Cir. 1985). In Birmingham, the Department has joined a collateral attack on a consent decree that this Administration itself entered into in 1981. The nominee's deputy has conceded that, in doing so, the Division has breached its written obligation to defend the consent decree from such attacks. Birmingham Post-Herald, March 26, 1985, p. C6.

IV. The Nominee Has Repeatedly Attempted to Override the Will of Local Officials and Employers Who Were Seeking to Comply With the Civil Rights Laws

The rationale offered for many of the nominee's actions has been the latitude that he believes the federal government should give to the concept of local control. But he has accorded such deference only where local authorities were resisting the implementation of civil rights laws. Where local officials have sought to comply with civil rights laws, Mr. Reynolds has demonstrated great willingness to override their interests.

A. The Seattle School Case. One of the first acts of the Justice Department after the nominee took office was to switch sides in a case pending in the Supreme Court in order to attack school desegregation plans voluntarily adopted by Seattle and other Washington school districts. The Department's position was explicitly rejected by the Supreme Court. Washington v. Seattle School District No. 1, 102 S.Ct. 3187 (1982).

B. Indianapolis and Other Post-Stotts Cases. In his zeal to undo affirmative remedies by misapplying Stotts, the nominee is disregarding the views of state and city governments that have signed consent decrees and are complying with them. The Department has sued to eliminate goals and timetables from the Indianapolis consent decree, despite the position of the city that the decree has proved to be "not just good social policy but good business." Washington Post, May 25, 1985, p. A2. Mr. Reynolds is apparently ready to proceed against several other cities that are ready to live with their civil rights obligations. Id.

C. St. Louis School Case. As noted, Mr. Reynolds opposed the entry of a consent decree agreed to by the NAACP, the St. Louis Board of Education and the boards of twenty-three suburban school districts. The decree called for voluntary inter-district desegregation, but the nominee opposed it because of the continued availability of other remedies if goals were not met. Despite the opposition of the nominee, the decree was upheld by the Court of Appeals (731 F.2d 1294, 8th Cir. 1984) and review was denied by the Supreme Court. 105 S.Ct. 82 (1984).

D. Tennessee Higher Education. In 1984, officials of the State of Tennessee agreed with lawyers for black plaintiffs to settle a long-standing case involving the effort to dismantle the racially dual system of public higher education that had long prevailed in the state. The settlement included goals for the enrollment of whites and minorities at each institution and a commitment to afford pre-professional training to specified numbers of minority undergraduates. The nominee argued against the settlement because of its "race consciousness." The District Court entered a consent decree and the Department is appealing. See Memorandum of U. S. in Opposition to Entry of Proposed Stipulation of Settlement in Geier v. Alexander, No. 5077 (M.D. Tenn., filed Aug. 9, 1984). See New York Times, September 26, 1984 at D23.

V. The Nominee Has Tolerated and Even Praised Individuals and Groups That Have Expressed Racial Bias

A. D'Agostino Memorandum. In 1981, the nominee's deputy wrote him a memo advising him against pursuing a case in Yonkers in its present form. On the issue of whether black students had been improperly classified in schools as emotionally disturbed, the memo said, "Why improperly...? Blacks because of their family, cultural and economic background are more disruptive in the classroom on the average. It seems that they would benefit from such programs." Memo of Robert J. D'Agostino, Deputy Assistant Attorney General to Reynolds, July 21, 1981.

Attorneys in the Civil Rights Division protested the memo as racially insensitive, but the nominee took no public action to indicate any disapproval. Washington Post, September 10, 1981, p. A17.

B. Speech to NANS. In 1984, the nominee delivered a speech to the National Association for Neighborhood Schools (NANS), a group that has dedicated itself to the spread of misinformation and rumor in ways designed to arouse panic and racial turmoil in communities facing desegregation. He lavished praise on the group, telling them of his "abiding respect...for the courageous and principled position [NANS] has staked out and defended in the area of school desegregation." He added that, "I...applaud you for daring to place our children's education needs ahead of our courts' transportation preferences." Statement of William Bradford Reynolds before the National Association of Neighborhood Schools, Pittsburgh, Pennsylvania, August 10, 1984, p. 1.

In a single sentence, the nominee who is sworn to uphold the law managed to exhibit disrespect for the courts while praising a group that has obstructed court orders.

VI. The Nominee Has Permitted and Participated in Political and Intrusions on the Fair Enforcement of the Laws

A. The Seattle School Case. Nofziger memo to Smith, Reynolds, Schultz, August 24, 1981.

B. The Mobile Voting Case. Deletion of the term "white supremacy" from Justice Department brief at behest of Senator Denton, Washington Post, May 16, 1981, p. A4.

C. The Bob Jones Case. Justice Department response to pressure from Representative Trent Lott.

VII. The Nominee's Actions Have Brought the Justice Department Into Disrepute in the Courts

A. Mississippi Prison Case. Judge Keady's statement that Justice Department does not propose to be bound by current orders of the court. Gates v. Collier, No. GC-71-6-K (N.D. Miss.) Order, January 6, 1983.

B. Tennessee Higher Education Case. Judge Wiseman's statement to Justice Department attorney ("You are an embarrassment...") Washington Post, September 30, 1984, p. A3.

VIII. Conclusion

The impact of the nominee's record on the civil rights of American citizens and the rule of law.

The CHAIRMAN. Mr. Fajardo, we will hear from you.

STATEMENT OF RICHARD P. FAJARDO

Mr. FAJARDO. Thank you, Mr. Chairman.

My name is Richard Fajardo. I am the acting associate counsel for the Washington, DC, office of the Mexican-American Legal Defense and Educational Fund. We are a civil rights organization dedicated to preserving the civil rights of Hispanic Americans and others throughout the Southwest and the Nation.

On behalf of MALDEF, I wish to express our opposition to the nomination and confirmation of William Bradford Reynolds as the Associate Attorney General.

It is important to understand that, like the other witnesses here today, our opposition stems not only from a disagreement with Mr. Reynolds on what the state of the current law is or what it should be, but is also based on the fact that Mr. Reynolds 'policies have been actively designed to dismantle, reverse, or eliminate longstanding civil rights principles by actively disregarding or reversing the current law. He has done this without reference to, and contrary to, current congressional action or intent, and contrary to many court rulings.

Let me just briefly state some examples of how his policies have affected Hispanic Americans throughout the country.

MALDEF was involved in a desegregation case in Denver in which the court had found specific instances of de jure segregation—that is, segregation in law. The school district filed a motion for declaration of unitary status—that is a determination that no more discrimination existed. The Justice Department had never been involved in that desegregation case. When they did decide to get involved they took the side, not of the plaintiff students seeking a desegregated school system, but the side of the school district. As recently as 2 days ago, the judge in Denver specifically rejected Mr. Reynolds' argument that only good faith to be shown by the district, but required that all vestiges of discrimination had to be effectively eliminated, as is the current law.

On the other hand, recently, Mr. Reynolds sent letters asking various local governments throughout the country to revise their consent decrees to eliminate existing affirmative action plans. MALDEF negotiated a number of those agreements in Los Angeles and San Francisco and in San Diego—painstaking negotiations that were done with the various police and fire departments in those areas. It is ironic that the Justice Department now seeks to dismantle the agreements. The irony here is that 31 years after the Supreme Court's decision in *Brown* v. *Board of Education*, we still have segregated schools in existence, but Mr. Reynolds has been very reluctant in actively pursuing and seeking to remedy such segregation, and in fact, has stepped in on behalf of various school districts, in particular the Denver School District.

Yet, 6 months after the *Stotts* decision, a Supreme Court decision with very narrow focus, Mr. Reynolds wants to broadly implement that decision across the country, and he wants to implement it immediately.

I think there is a terrible irony there.

We have also had some problems with respect to the implementation of the Voting Rights Act. There has been a large increase in the number of cases that have been submitted for preclearance. These cases have been almost routinely precleared by the Justice Department; about 96 percent of cases submitted have been precleared.

The problem is that in many instances, especially with cases and districts involving Hispanic Americans, there have been problems in preserving the voting rights of the community and some cases should not have been precleared.

I will close here, and I would like to yield the balance of my time to Mr. Eric Snapper.

The CHAIRMAN. Thank you.

[Statement follows:]

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MALDEF

TESTIMONY OF

RICHARD P. FAJARDO, ACTING ASSOCIATE COUNSEL
MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND

BEFORE THE

COMMITTEE ON THE JUDICIARY
U.S. SENATE

IN RE:
CONFIRMATION HEARINGS OF WILLIAM BRADFORD REYNOLDS FOR
U.S. DEPUTY ASSISTANT ATTORNEY GENERAL

WASHINGTON, D.C.
June 4, 1985

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Mr. Chairman, my name is Richard P. Fajardo. I am the Acting Associate Counsel for the Washington, D.C. office of the Mexican American Legal Defense and Educational Fund (MALDEF). MALDEF is a national civil rights organization dedicated to preserving the civil and constitutional rights of persons of Mexican and Hispanic descent. We currently have offices in San Francisco, Los Angeles, Denver, San Antonio, Chicago and here in Washington, D.C.

On behalf of MALDEF, I wish to express our opposition to the nomination and confirmation of William Bradford Reynolds as the U.S. Deputy Assistant Attorney General. During Mr. Reynolds' tenure as the head of the Justice Department's Civil Rights Division, he has demonstrated a disregard for our nation's civil rights laws--laws which he has been charged to uphold.

It is important to note that MALDEF's opposition stems not simply from a disagreement with Mr. Reynolds about what the state of the current law is or should be. Our opposition is based upon Mr. Reynolds' policies designed to actively dismantle, reverse or eliminate long-standing civil rights principles by actively disregarding and reversing current laws.

The enactment and enforcement of our civil rights laws has evolved to address well-documented problems of discrimination against classes of individuals, as well as against individuals themselves. The Congress, administrative agencies, and the courts approved and vigorously pursued remedies which most effectively got at the root of the discrimination. In many cases, remedies have been approved or pursued only after other efforts have failed. For example, in the area of school desegregation, busing has been used only when other efforts, such as magnet schools, have failed to accomplish their goal. In employment, affirmative action in recruitment, hiring, and promotion has led to positive changes in the employee profile of many industries. Quotas, contrary to this Administration's claim, have been used only as a last resort in seeking to desegregate an employer's workforce.

The Federal Government, especially the Civil Rights Division (CRD) of the Department of Justice (DOJ), shoulders a special responsibility to enforce civil rights laws throughout the nation. This role has been critical to the progress made in civil rights enforcement and cannot be underestimated. The Federal Government has lent its resources and prestige to and on behalf of plaintiffs seeking to vindicate their right to be free from discrimination. The message until the 1980's was clear: the Federal Government stood ready to protect persons against states, local governments, private firms or individuals who discriminate.

However, the role of the Executive Branch in its enforcement of civil rights laws has made a dramatic shift under the Reagan Administration and under Mr. Reynolds' tenure as the head of the Civil Rights Division. [1] First, under Mr. Reynolds, the Civil

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[1] This shift is well documented in two reports published last year: ACLU, In Contempt of Congress and the Courts, the Reagan Civil Rights Record, (February 27, 1984); Leadership

(Footnote Continued)

Rights Division has reduced or weakened the Federal Government's civil rights authority. At its best, the Civil Rights Division has chosen to mediate disputes between victims and perpetrators of discrimination rather advocate on behalf of the victims of discrimination. At its worst, CRD has aligned itself with the interest of defendants, choosing to defend or excuse the discriminatory acts rather than prosecute those actions.

Second, Mr. Reynolds has actively sought to undermine the civil rights principles long recognized by Congress and the courts. His attorneys have advocated positions which seek to weaken or reverse well established legal principles and have failed to enforce laws they disagreed with and could not change.

Third, even in those situations where entities recognized their discriminatory practices and sought to voluntarily remedy them, the Administration has repeatedly sought to oppose these voluntary efforts.

(Footnote Continued)
Conference on Civil Rights, Without Justice, a Report on the Conduct of the Department of Justice in Civil Rights in 1981-82, (February, 1982).

EDUCATION

In the past, the Civil Rights Division has been instrumental in helping to remedy civil rights violations. However, this is no longer the case. MALDEF and other civil rights groups can no longer rely on DOJ as we did before this Administration. Many times we find ourselves not only litigating to enforce compliance by violating states, but also fighting actions initiated by the Justice Department which prolong abuses of civil rights or negatively affect desegregation plans to a point of dismantling hard won progress.

Assistant Attorney General Reynolds has expressed views on school desegregation remedies that are diametrically opposed to the legal principles established by the Supreme Court in Brown v. Board of Education, 349 U.S. 294 (1955), Green v. Board of New Kent County, 391 U.S. 430 (1968), Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971), Keyes v. School District No. 1, Denver, Colorado, 413 U.S. 189 (1973). He has stated that the Department will, on a court finding of de jure segregation, seek desegregation remedies which emphasis "Freedom of Choice" and "separate but equal", rather than court ordered busing.[2]

As a result, the Department of Justice has filed only one new desegregation case, in Bakersfield, California, and even then it accepted a settlement which instituted a voluntary desegregation plan modeled after plans in Chicago, Illinois and Ector County, Texas. These plans have been ineffective in desegregating their schools. Voluntary desegregation plans call for parents to volunteer their children for transfer to another school. While some parents do volunteer in initial years, they soon withdraw from the program with the result that school districts remain segregated.

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[2] Hearings, November 19, 1981.

In addition, this Department of Justice has begun to realign itself with defendant school districts rather than with plaintiffs seeking the desegregation of schools as prior Administrations did.

MALDEF has been involved in a desegregation case against a Denver school district for several years. See Keyes v. School District No. 1, Denver, Colorado, 413 U.S. 189 (1973). The Court found the Denver school system guilty of de jure discrimination and ordered the appropriate relief. The Department of Justice had never taken an active role in this case until recently.

In December 1983, the School District filed a motion for "Declaration of Unitary Status", in other words, requesting a court finding that it had eliminated all vestiges of discrimination. In order to be granted such a ruling, the district must demonstrate that it had eradicated all vestiges of discrimination in six areas: student assignments, faculty, staffing, transportation, facilities and extra curricular activities. Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971); see also Green v. Board of New Kent County, 391 U.S. 430 (1968); Keyes, supra.

The Department of Justice has filed a brief siding with the Denver School District. The DOJ advocated, without considering the facts, that the standard of review be weakened so that the school district would only be required to show "good faith" efforts in eradicating the vestiges of discrimination, as determined by the district itself. Moreover, DOJ argued such a showing need not be required in all six categories.

EMPLOYMENT

The Reagan Administration has effectively declared war on affirmative action remedies to alleviate employment discrimination against protected groups. Fueled by an overbroad reading of the U.S. Supreme Court's decision in Firefighters Local Union No. 1784 v. Stotts 104 S.Ct. 2576 (1984), Assistant Attorney General Reynolds has pledged to reform court orders and consent decrees that contain, in his words, "preferential relief" and to which the Justice Department is a party. Yet Mr. Reynolds' view, that "federal courts may not require or permit race or gender conscious hiring, promotion or layoff quotas as an element of Title VII relief . . .in an employment discrimination case" has not found a home in any of the circuit courts of appeal which have interpreted and followed the Stotts decision.[3] In addition, the Justice Department has publicly declared it will seek a reversal of the U.S. Supreme Court decision in United Steelworkers v. Weber, 443 U.S. 193 (1979) which permits voluntary employer and union sponsored affirmative action agreements. Moreover, the Department is no longer seeking hiring goals and timetables as remedies for pattern and practice cases of discrimination. The only remedies the Justice Department will seek are monetary damages and/or job reinstatement for specific identifiable victims of discrimination or increased recruitment from disadvantaged groups. Finally, the Justice Department has intervened in litigation to request reconsideration of existing goals and timetables agreements.

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[3] William Bradford Reynolds, statement before Subcommittee on Civil and Constitutional Rights, Judiciary Committee, House of Representatives concerning DOJ Authorization, April 17, 1985 at p. 10.

It is important to note that the Administration has erroneously characterized the affirmative action remedies of goals and timetables as "quotas." The goals and timetables remedy does not require an employer to hire minorities over non-minorities, but instead is meant to encourage employers to review their hiring practices and to eliminate procedures which will discriminate against minority applicants. The Supreme Court has long recognized that hiring practices or qualifications which have a discriminatory impact upon a protected group are illegal unless there is a bona fide reason for the practice. Griggs v. Duke Power. Moreover, without goals and timetables, employers have little or no incentive to hire minorities or change their discriminatory practices.

MALDEF has participated in and negotiated a good number of the voluntary agreements with local and state jurisdictions to correct past discrimination. Assistant Attorney General Reynolds has encouraged parties to such actions in which affirmative action agreements have been made to reconsider their cases. You are well aware of the over fifty jurisdictions that have received Justice Department letters requesting a re-opening of long-settled decrees. We are encouraged that in all but a few cases the jurisdictions have refused the Department's invitation to regress to the days when municipal departmental personnel were all-white or all-male. Nonetheless, it is disheartening that the slow progress MALDEF and others made with, among others, the Los Angeles Fire Department and San Diego police and fire units is jeopardized by the recent action by the Civil Rights Division, the division to which is delegated the enforcement of the nation's civil rights laws.

VOTING RIGHTS

Section 5 of the Voting Rights Act of 1965 requires certain states or political subdivisions which have a demonstrated history of discrimination in voting practices, to preclear any changes in their voting procedures with the Justice Department. The Justice Department investigates these proposed changes to assure that they will not have a discriminatory impact on protected minorities. Only those changes precleared by the Justice Department can be implemented by the state or local entity. In 1975, section 5 coverage was extended to Texas and other jurisdictions in the Southwest which had a history of discriminating against Hispanics in their electoral processes.

Since the Reagan Administration took office in 1981, the number of electoral changes submitted for preclearance has risen dramatically, largely as a result of decennial redistricting. The Department of Justice has received 36,968 submissions of election changes for review,[4] of which 96.6 percent have been precleared. In addition, the number of objections has not increased but in fact decreased during the last four years.[5] In the state of Texas, which has one of the worst records of voting rights violations against Hispanics, the number of objections has fallen off dramatically to only 15 for the period from 1981 to 1984.

While a substantial increase in preclearance submissions is to be expected given new redistricting plans following the 1980 census, our concern is that the Justice Department is almost routinely granting preclearance and that election changes which dilute the voting power of Hispanics are being summarily approved.

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[4] This represents 50.8 percent of all (70,766) submissions received throughout the twenty years history of the Voting Rights Act.

[5] Of the total number of letters of objection (1,043) issued to election changes from 1965 through June, 1984, only 232 (22.4 percent) have been issued since January of 1981. In addition, the total preclearance submissions to the Department of Justice increased during the period of 1981-84 over the period of 1977-80 by 64.87 percent (from 20,722 to 33,833) the total number of objections to election changes issued by the Department dropped from 135 to 131 between those same periods.

Kinney County, Texas, for example, filed for an election change preclearance in January 1984. The county conducted elections in four Justice of the Peace and Constable districts. Two of the four Justices of the Peace and two of the Constables were Mexican American. Kinney County requested preclearance to allow only one Justice Peace and Constable for the county elected at large. DOJ determined the change was not retrogressive, that is, it did not negatively impact Hispanic voters, and precleared the change. No Mexican Americans have been elected to either post since.

More recently in Austin, Texas the Justice Department pre-cleared an annexation which decreased the minority population by two percent. Where an annexation causes such a minority population decrease, the Justice Department would normally insist upon a companion change to single member election districts. In the past, both Houston and San Antonio had benefitted from this additional change following an annexation with even less of a minority population decrease. Inexplicably, the Justice Department failed to require single member districts in Austin and precleared the annexation just this past February.

Underpinning the Justice Department's pre-clearance of the Austin annexation is its refusal in Texas to apply the "effects" test of Section 2 of the Voting Rights Act to the Section 5 retrogression standard for pre-clearance in the same manner it does in the Deep South. When taken together, Section 2 and Section 5 would demand that the Austin annexation which decreases minority population be treated as retrogressive. Justice

Department pre-clearance in the absence of single member districts was unwarranted in Austin.

Equally troublesome are Justice Department determinations that redistricting of Goliad and Medina Counties was not retrogressive. In early 1983, Goliad County in southeastern Texas redrew the County Commission lines. One district was redrawn from 64.2% Hispanic under 1970 Census data to 61.7% Hispanic by 1980 figures. The Justice Department concluded the change was not retrogressive. No Hispanic has been elected under this plan. In Medina, an early 1980 negotiated settlement of litigation created what was intended by all parties to be a 65% Mexican American County Commissioner district. 1980 Census figures disclosed that what was a 65% Mexican American district by 1970 Census data actually was 57.8% Mexican American. The county redistricted in 1982 to make it a 58% Mexican American district. The Justice Department found no retrogression in the 58% district even though all parties, including the county government, intended and expected the district to have been 65% Mexican American.

The direction Mr. Reynolds has taken the Civil Rights Division of the Justice Department away from the time-honored standards of vigorous enforcement of civil rights laws is most clear by what MALDEF itself has experienced in Calhoun County and Beeville, Texas.

In early 1982, the Justice Department precleared new districts for the Calhoun County Commissioner Court. One of these districts had a Mexican American population of 53.6% and a minority population of 56.6%. MALDEF submitted districting plans for a 64% Mexican American, 70% minority district. Even though the Calhoun County Commissioner Court has never had a Mexican American member the Department opted for the lesser minority population plan for this county. The experience in this county demonstrates a departmental attitude which at best can be described as uncooperative to Hispanic organizations seeking to make the Voting Rights Act work. It can only result in less confidence and trust being placed in the Justice Department by those whose civil rights the Department is charged with protecting.

Sadly it is all too clear that the meaning and purpose of voting rights laws have been thwarted by this Administration. We make this statement advisedly. After the Justice Department conduct in Beeville, Texas we can reach no other conclusion.

In the mid 1970's, MALDEF waged a constitutional challenge to Beeville's change from at-large local elections to a gerrymandered numbered post system. The courts enjoined Beeville from making the change, and, in the intervening years as the Mexican American population of Beeville increased, voters elected three Mexican Americans, including the Mayor, to the five member City Council.

Local Beeville officials, MALDEF attorneys, and community groups undertook a cooperative and deliberative effort to reach agreement on a single member district plan. After months of drawing districts, positing proposals, and collecting citizen consensus, MALDEF and Beeville came up with a plan acceptable to all. The Beeville city government submitted the new plan to the Justice Department, MALDEF supported the city government's submission and there was considerable sentiment in favor of its adoption. Yet the Justice Department dragged its feet and held up the implementation of the plan until finally approving it a long time later. The Department was markedly absent from the new spirit of cooperation between a local government and community groups working together to make meaningful the protections of the VRA in Texas. Not too many years ago when MALDEF first went to Beeville, our attorneys were met literally by the warning to get out of town by sundown. The message we hear today from the Justice Department is only too similar.

We have made great progress in Beeville. But at the Justice Department, civil rights are in a tailspin. Meaningful assistance of and cooperation with civil rights organizations is unwanted. The rights of Americans who are of Hispanic or other minority heritage are opposed.

CONCLUSION

The office of Deputy Assistant Attorney General, like all the offices of the Justice Department, is charged with enforcing all of the nation's laws. Persons in charge of the public trust must enforce these laws fairly and not manipulate them. The Attorney General and his assistants cannot disregard laws simply because they are philosophically opposed to them. They must actively uphold and enforce all laws until these laws are changed by Congress or reversed by the courts.

Mr. Reynolds as head of the Civil Rights Division has not only failed to enforce our nation's civil rights laws but has demonstrated a contempt and callous disregard for those laws. This is especially true for civil rights laws which were established to protect the weakest of America's citizens. We have not fully shared in America's promise of equal opportunity.

He has abdicated the role of the federal government in the enforcement of civil rights laws, a role which is so critical to the development of civil rights law. Previous administrations, Democratic and Republican alike, advocated on behalf of protected minorities who were the victims of discrimination, lending the power and prestige of the federal government to prevent and correct violations of the nation's civil rights laws.

Mr. Reynolds, however, has sought to weaken their civil rights enforcement efforts. In some instances the Civil Rights Division has backed away from taking any enforcement action to correct civil rights violations. In other instances, the Department has actively worked to weaken, reverse or eliminate those laws established and upheld by Congress and the Courts.

Thus, Mr. Reynolds has demonstrated that he is not qualified for the office of U.S. Deputy Assistant Attorney General and we urge this Committee to reject his confirmation to this important office.

The CHAIRMAN. Mr. Snapper?

STATEMENT OF ERIC SNAPPER

Mr. SNAPPER. Senator, the issues raised by this nomination necessarily transcend the disputes about particular cases and legal controversies. The action that the committee will take on this nomination will send a message to America, a message to the voters of New Orleans, to the parents of handicapped children in Oklahoma, to black students in your home State of South Carolina. It will be a message about fairness and zealotry; a message about the role of the Department of Justice in protecting the interests of the weak and the oppressed, about the importance which Congress still attaches to the vigorous enforcement of the civil rights laws of the United States.

The nominee comes from the administration. The record is Mr. Reynolds', but the final responsibility and the message will be yours.

Whatever the committee or individual Senators may articulate as a standard you intend to apply, the public at-large will read in the approval of this nomination only one meaning—that the Senate of the United States regards Mr. Reynolds' past conduct in office not only as acceptable, but as so commendable as to warrant promotion to a more powerful and prestigious office. That may or may not be the criteria contemplated by the advise and consent clause of the Constitution. But in the world outside this committee room, promotions are bestowed on those whose performance sets a high standard to which all ought to aspire, and accurate or not, that is how the Nation will understand the action of the Senate.

To black schoolchildren across the Nation, many of them still ill-housed, ill-clothed, ill-fed, and relegated to all-black schools, confirmation will announce that the Senate of the United States has chosen to reward and commend the man who led the fight to give tax subsidies to racist segregated academies.

To black voters, many of whom are old enough to recall the days when the Department of Justice was in the forefront of the struggle for equal opportunity to participate in the political process, confirmation will proclaim that the Senate of the United States has extended its thanks and approval to the Department official who battled for almost a year to prevent expansion of the Voting Rights Act.

To minorities who still experience unemployment at twice the rate of whites, to women who still earn substantially less than comparable men, confirmation will assert that the Senate of the United States views with favor a man who, in a few short months, has attacked more title VII decrees than anyone in the previous 4 years.

To the dedicated attorneys in the Department of Justice who have fought against many of the ill-conceived decisions and practices with which you are all too familiar, confirmation is going to announce that the Senate of the United States no longer encourages or desires them to put them careers at risk merely to enforce the Constitution and laws of the United States.

To all Americans who may be the victims of bigotry and intolerance, whose constitutional or statutory rights may hereafter be violated, confirmation will warn that the Senate of the United States no longer insists that the Department of Justice be a reliable source of aid and counsel in ending such injustices.

I do not believe that the committee wants to send any such message. But in the context of the public record of the Civil Rights Division under Mr. Reynolds, it is inevitable that approval of his nomination will be understood in this way.

Rejection of this nomination will work no injustice to Mr. Reynolds personally. The symbolic importance unavoidable attached to his nomination is largely of his own doing. Mr. Reynolds was not some innocent youth, drafted into a cause which he neither supported nor understood. He was the leader of the shock troops which for 4 years have attacked with vigor and daring the statutes and precedents that protect the rights of minorities and women and the handicapped.

It would be easier for the committee to support this nomination of Mr. Reynolds acknowledged that he had erred in the past or that he had learned from his mistakes. But Mr. Reynolds does not stand before this committee in sackcloth, begging forgiveness. He is here, unrepetent, unwiser for his errors, anxious to embark on still more of the ill-conceived campaigns of the past.

Do not send Mr. Reynolds forth on such a mission. The Department of Justice and the Nation can ill afford another *Bob Jones* case, another New Orleans racial gerrymander, another Selma polling place relocation. The days ahead will be difficult enough without an Associate Attorney General conjuring up new problems and provoking new controversies.

By rejecting this nomination, the committee will make clear that the type of record which Mr. Reynolds has compiled is a bar, not a ticket, to higher office, and that neither stridency in opposition to quotas or bussing, nor an occasionally constructive action, will immunize from scrutiny the unfortunate actions that have been discussed at these hearings.

The CHAIRMAN. Thank you very much, Mr. Snapper. If you did not finish, you can put the rest in the record.

I believe Ms. Wilson, Ms. Goldsmith, and Mr. Jacob have come in.

Mr. KAPP. Mr. Chairman, I am Robert Kapp. I am replacing Thomas Barr, for the Lawyers Committee for Civil Rights.

The CHAIRMAN. All right. If all of you would stand up, raise your hands and be sworn.

Do you swear that the testimony you will give in this hearing will be the truth, the whole truth, and nothing but the truth, so help you, God?

Ms. GOLDSMITH. I do.

Ms. WILSON. I do.

Mr. JACOB. I do.

Mr. KAPP. I do.

The CHAIRMAN. Ms. Wilson, we will hear from you now.

STATEMENT OF KATHY WILSON

Ms. WILSON. Mr. Chairman, thank you for the opportunity to appear before you today. I am Kathy Wilson, Chair of the National Women's Political Caucus, which is a nationwide, multipartisan organization with 77,000 members in over 300 State and local caucuses. We work to win for women equal representation in elective and appointive office, and we speak out on issues of direct concern to women.

Central to our goal is the effective, conscientious enforcement of our Nation's civil rights laws, and it is in defense of our most fundamental principles that I am here today testifying against the confirmation of William Bradford Reynolds as Associate Attorney General.

William Bradford Reynolds' words and deeds as Assistant Attorney General demonstrate conclusively that he does not understand the very nature of discrimination, and that he has no sympathy with the necessity for affirmative action.

Mr. Reynolds believes, and bases his policies on the belief, that the problems caused by discrimination are largely over. He considers affirmative action superfluous at best, reverse discrimination at worst.

What he does not realize is that discrimination is the product of centuries of narrow and backward ways of thinking. He does not understand that although discrimination may come in less perceptible forms than it did 20 years ago, the the attitudes and social institutions that foster it are slow and stubborn in changing, and, unless systematically attacked, discrimination will perpetuate itself in often very ingenious ways.

Even though employers may claim that they are treating people equally, many are not, and unless required to do so, many will not. Does anyone believe, for example, that women would have become police officers and firefighters without a court order or threat thereof? Can anyone possibly believe that the many police and fire departments who still do not have women in their forces will voluntarily start hiring them?

Until the advent of affirmative action, women simply did not apply for such traditionally male jobs. Any woman who would have had the temerity to do so would have been ridiculed by her peers, her parents, and her teachers. And if a woman had been hired, her colleagues would have mistreated her without interference by supervisors. In many localities, these incidents, which we would all like to think of as relics of the past, still occur today.

In prior administrations, the Assistant Attorney General for Civil Rights participated in suits to require governmental institutions to adopt affirmative action programs. Had Mr. Reynolds' views prevailed then, and relief granted only to those women who could prove they had been personally discriminated against, far fewer women would today hold nontraditional jobs in state and local governments.

Last, but certainly not least, Mr. Reynolds has displayed a lack of commitment to civil rights by seeking to greatly narrow the application of four civil rights laws prohibiting discrimination against women, minorities, the disabled and senior citizens. I refer to the infamous *Grove City* decision of the Supreme Court. First, he advocated the narrow interpretation adopted by the Court. Then he announced this decision applied to title VI of the Civil Rights Act of 1964, prohibiting discrimination against minorities; to section 504 of the Rehabilitation Act of 1973, and to the Age Discrimination

Act of 1975, as well as title IX of the Education Amendments of 1972.

Now he supports S. 272, which would only partially reverse the *Grove City* decision with respect to education, although the three laws other than title IX have a much broader application.

Mr. Reynolds claims he asked the Supreme Court to adopt a program-specific interpretation because he thought that was what Congress intended. This indicates lack of respect for the intelligence of the Congress, to assume that the Congress in passing title IX intended to prohibit discrimination in one college building, but not in another on the same campus, in one class but not in another. Or, did he assume that Congress was so cynical that it passed a law widely heralded as prohibiting discrimination in education because of sex, but as full of holes as Swiss cheese in its application?

These are but a few examples of Mr. Reynolds' lack of respect for the legal process and the Congress. Other witnesess will provide you with others.

In summary, we believe that Mr. Reynolds is not qualified to be the Associate Attorney General because he does not understand the nature of discrimination and does not respect the Judicial and Legislative processes of our tripartite system of government.

Thank you.

The **Chairman**. Thank you, Ms. Wilson.

[Statement follows:]

STATEMENT OF KATHY WILSON

NATIONAL CHAIR

NATIONAL WOMEN'S POLITICAL CAUCUS

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE: THANK YOU FOR THE OPPORTUNITY TO APPEAR BEFORE YOU TODAY. I AM KATHY WILSON, CHAIR OF THE NATIONAL WOMEN'S POLITICAL CAUCUS. THE NWPC IS A NATIONWIDE MULTIPARTISAN ORGANIZATION WITH 77,000 MEMBERS IN 300 STATE AND LOCAL CAUCUSES.

WE WORK TO WIN FOR WOMEN EQUAL REPRESENTATION IN ELECTIVE AND APPOINTIVE OFFICE AND WE SPEAK OUT ON ISSUES OF DIRECT CONCERN TO WOMEN. CENTRAL TO OUR GOAL IS THE EFFECTIVE CONSCIENTIOUS ENFORCEMENT OF OUR NATION'S CIVIL RIGHTS LAWS. AND IT IS IN DEFENSE OF OUR MOST FUNDAMENTAL PRINCIPLES THAT I AM HERE TODAY TESTIFYING AGAINST THE CONFIRMATION OF WILLIAM BRADFORD REYNOLDS AS ASSOCIATE ATTORNEY GENERAL.

AN ASSOCIATE ATTORNEY GENERAL OF THE UNITED STATES IS SUPPOSED TO BE ONE OF OUR NATION'S CHIEF LAW ENFORCEMENT OFFICERS. HE - OR SHE - IS SUPPOSED TO SEE THAT ALL OF OUR CITIZENS RECEIVE THE LAW'S PROTECTION - AND THAT HARD-WON, BOTTOM LINE CIVIL RIGHTS GAINS ARE UPHELD NO MATTER THE POLITICAL WINDS OF THE DAY.

WILLIAM BRADFORD REYNOLDS IS NOT SUCH A PERSON. AS ASSISTANT ATTORNEY GENERAL FOR CIVIL RIGHTS, HE HAS NOT CARRIED OUT THIS MOST BASIC RESPONSIBILITY. HE REPEATEDLY STEERED HIS DEPARTMENT'S POLICIES AWAY FROM BOTH THE SPIRIT AND THE LETTER OF OUR CIVIL RIGHTS LAWS. THIS IS A MAN MORE INTERESTED IN SUBVERTING THE LAW THAN IN ENFORCING IT. HIS WORDS AND DEEDS AS ASSISTANT ATTORNEY GENERAL DEMONSTRATE CONCLUSIVELY THAT HE DOES NOT UNDERSTAND THE VERY NATURE OF DISCRIMINATION AND THAT HE HAS NO SYMPATHY WITH THE NECESSITY FOR AFFIRMATIVE ACTION.

MR. REYNOLDS BELIEVES, AND BASES HIS POLICIES ON THE BELIEF, THAT THE PROBLEMS CAUSED BY DISCRIMINATION ARE LARGELY OVER. HE CONSIDERS AFFIRMATIVE ACTION SUPERFLUOUS AT BEST, REVERSE DISCRIMINATION AT WORST.

WHAT HE DOESN'T REALIZE IS THAT DISCRIMINATION IS THE PRODUCT OF CENTURIES OF NARROW AND BACKWARD WAYS OF THINKING. HE DOESN'T UNDERSTAND THAT ALTHOUGH DISCRIMINATION MAY COME IN LESS PERCEPTIBLE FORMS THAN IT DID TWENTY YEARS AGO, THE ATTITUDES AND SOCIAL INSTITUTIONS THAT FOSTER IT ARE SLOW AND STUBBORN IN CHANGING. AND UNLESS SYSTEMATICALLY ATTACKED, DISCRIMINATION WILL PERPETUATE ITSELF IN OFTEN VERY INGENIOUS WAYS.

EVEN THOUGH EMPLOYERS MAY CLAIM THAT THEY ARE TREATING PEOPLE EQUALLY, MANY AREN'T. AND UNLESS REQUIRED TO DO SO, MANY WON'T. DOES ANYONE BELIEVE, FOR EXAMPLE, THAT WOMEN WOULD HAVE BECOME POLICE OFFICERS AND FIREFIGHTERS WITHOUT A COURT ORDER OR THREAT THEREOF? CAN ANYONE POSSIBLY BELIEVE THAT THE MANY POLICE AND FIRE DEPARTMENTS WHO STILL DO NOT HAVE WOMEN IN THEIR FORCES WILL VOLUNTARILY START HIRING THEM?

UNTIL THE ADVENT OF AFFIRMATIVE ACTION, WOMEN SIMPLY DID NOT APPLY FOR SUCH TRADITIONALLY MALE JOBS. ANY WOMAN WHO WOULD HAVE HAD THE TEMERITY TO APPLY WOULD HAVE BEEN RIDICULED BY HER PEERS, HER PARENTS AND HER TEACHERS. AND IF A WOMAN HAD BEEN HIRED, HER COLLEAGUES WOULD HAVE MISTREATED HER WITHOUT INTERFERENCE BY SUPERVISORS. IN MANY LOCALITIES, THESE INCIDENTS - WHICH WE'D ALL LIKE TO THINK OF AS RELICS OF THE PAST - STILL OCCUR TODAY.

IN PRIOR ADMINISTRATIONS, THE ASSISTANT ATTORNEY GENERAL FOR CIVIL RIGHTS PARTICIPATED IN SUITS TO REQUIRE GOVERNMENTAL INSTITUTIONS TO ADOPT AFFIRMATIVE ACTION PROGRAMS. HAD MR. REYNOLD'S VIEWS PREVAILED THEN, AND RELIEF GRANTED ONLY TO THOSE WOMEN WHO COULD PROVE THEY HAD BEEN PERSONALLY DISCRIMINATED AGAINST, FAR FEWER WOMEN WOULD TODAY HOLD NONTRADITIONAL JOBS IN STATE AND LOCAL GOVERNMENTS.

MR. REYNOLDS HAS NOT ONLY ABANDONED THE USE OF AFFIRMATIVE ACTION GOALS AND TIMETABLES AND COURT-ORDERED QUOTAS, BUT HE ALSO SEEKS TO TURN BACK THE CLOCK IN LOCALITIES WHERE VOLUNTARY AGREEMENTS ARE SUPPORTED BY LOCAL POLITICAL LEADERS. MR. REYNOLDS BASES HIS ACTIONS ON A STRAINED INTERPRETATION OF A SUPREME COURT DECISION RELATING ONLY TO REDUCTIONS IN FORCE. OTHER LEADING LEGAL AUTHORITIES DISAGREE. WITHOUT WAITING FOR THE SUPREME COURT TO DECIDE THE CONTROVERSY, HE IS ATTEMPTING TO FORCE HIS DUBIOUS INTERPRETATIONS ON A LARGE NUMBER OF CITIES AND STATES THAT HAVE ENTERED INTO VOLUNTARY AFFIRMATIVE ACTION AGREEMENTS. IN ADDITION, HE IS ATTEMPTING TO ENGINEER REVERSALS OF COURT-ORDERED AFFIRMATIVE ACTION PROGRAMS INSTITUTED IN THE PAST.

FURTHERMORE, MR. REYNOLDS HAS UNILATERALLY DECIDED THAT AN EQUAL EMPLOYMENT OPPORTUNITY COMMISSION REQUIREMENT - ADOPTED IN ACCORDANCE WITH A CONGRESSIONAL MANDATE - IS UNAUTHORIZED AND UNCONSTITUTIONAL. AS A RESULT, THE JUSTICE DEPARTMENT HAS REFUSED TO SUBMIT GOALS AND TIMETABLES FOR REMEDYING DISCRIMINATION IN THE DEPARTMENT TO THE EEOC.

THESE ARE BUT A FEW EXAMPLES OF MR. REYNOLD'S LACK OF RESPECT FOR THE LEGAL PROCESS AND THE CONGRESS. OTHER WITNESSES WILL PROVIDE YOU WITH OTHERS.

IN SUMMARY, WE BELIEVE THAT MR. REYNOLDS IS NOT QUALIFIED TO BE ASSOCIATE ATTORNEY GENERAL BECAUSE HE DOES NOT UNDERSTAND THE NATURE OF DISCRIMINATION AND DOES NOT RESPECT THE JUDICIAL AND LEGISLATIVE PROCESSES OF OUR TRI-PARTITE SYSTEM OF GOVERNMENT.

Last, but certainly not least, Mr. Reynolds has displayed a lack of committment to civil rights by seeking to greatly narrow the application of four civil rights laws prohibiting discrimination against women, minorities, the disabled, and senior citizens. I refer to the infamous Grove City decision of the Supreme Court.. First, he advocated the narrow interpretation adopted by the Court; then he announced this decision applied to Title VI of the Civil Rights Act of 1964 prohibiting discrimination against minorities; to Section 504 of the Rehabilitation Act of 1973; and to the Age Discrimination Act of 1975, as well as Title IX of the Education Amendments of 1972.

Now he supports S. 272, which only partially reverses the Grove City decision with respect to education although the three laws other than Title IX have a much broader application.

Mr. Reynolds claims he asked the Supreme Court to adopt the program specific interpretation because he thought that was what Congress intended. This indicates a lack of respect for the intelligence of the Congress - to assume that the Congress in passing Title IX intended to prohibit discrimination in one college building but not in another on the same campus, in one class but not in another. Or did he assume the Congress was so cynical that it passed a law widely heralded as prohibiting discrimination in education because of sex but as full of holes as a swiss cheese. in its application?

The **Chairman**. Ms. Goldsmith?

STATEMENT OF JUDY GOLDSMITH

Ms. **Goldsmith**. Thank you.

My name is Judy Goldsmith, and I am president of the National Organization for Women with a quarter of a million members nationwide. I appreciate the opportunity to testify before you today in regard to the nomination of William Bradford Reynolds to become Associate Attorney General.

For more than two decades, the Department of Justice has been in the forefront of the struggle for civil rights. In the past, it has provided the Government with guidelines on the integration of women and minorities into the mainstream of American life. In the past, it has pursued the proper role of Government—that of safeguarding the rights and well-being of its citizens. And during the past two decades, women and minorities have made significant strides in a number of areas, including education and employment. Laws enacted and enforced over this period of time were intended to guarantee all citizens equal access to opportunities.

However, Mr. Reynolds has become the Scrooge of the Justice Department. He has been stingy and mean-spirited in dispensing justice to the citizens of this nation. In accordance with this administration's philosophy, Mr. Reynolds has taken a position diametrically opposed to our former national commitment to equality of opportunity for all.

In his present capacity, Mr. Reynolds has appeared prominently in the news over the last few years as the administration's chief spokesperson for civil rights policy—indeed, as the architect of much of that policy.

Chief among our concerns are affirmative action and enforcement of civil rights protections which were challenged and severely weakened in the *Grove City* case over 1 year ago.

Shortly after arriving at the Department of Justice during the first Reagan term, Mr. Reynolds announced that affirmative action remedies would be rejected by the Reagan administration. He made clear his contention that remedies should be "colorblind and gender-neutral." The words have a noble sound, but they ring hollow in the context of today's realities. We have not ended sex and race discrimination in the past 20 years; we have only begun to repair their ravages.

We know the history, as does Mr. Reynolds. We know that the pattern and practice of discrimination has awarded an automatic preference to white males. The initial efforts to reverse that history through affirmative action have yielded some progress, but economic and educational realities are still far from gender-neutral and colorblind. To refuse to acknowledge that fact, as Mr. Reynolds so obviously does, is to miss the mark in curing the problem, if that is his intent. However, the intent appears to be to return us to the "good old days" when the "good old boys" controlled everything without let or hindrance.

Further, Mr. Reynolds' insistence on remedying discrimination on an individual-by-individual basis is in itself a clear indication of his determination to make remedies all but impossible. Most individual victims of discrimination do not have the resources to pursue costly court cases, and the odds are stacked against their being able to prove that they as individuals were discriminated against simply because of sex or race. Discrimination has gotten much too sophisticated for that. The one-at-a-time philosophy is clearly designed to fragment and separate the victims of discrimination, to keep us from using the strength of our numbers as a major resource in our ongoing fight for justice.

In the continuing efforts of women to win economic justice, pay equity is a major issue. It addresses the twin problems of job segregation and wage discrimination, the combination of which is central to the persistence of the wage gap and the feminization of poverty. On this issue, too, women look in vain to Mr. Reynolds as an advocate for them in seeking economic justice.

At the time of Judge Tanner's ruling in the *AFSCME* case in Washington State, Mr. Reynolds gratuitously offered the opinion that he was certain Judge Tanner had ruled incorrectly, in spite of the fact that Mr. Reynolds had not yet even read the materials used in the case. He is clearly supportive.

The CHAIRMAN. Your time is up. You can put the rest in the record. Please finish your sentence, if you wish.

Ms. GOLDSMITH. Thank you. I will simply say that the National Organization for Women strongly opposes the nomination of William Bradford Reynolds.

The CHAIRMAN. Thank you very much, Ms. Goldsmith.

[Statement follows:]

National Organization for Women, Inc.
1401 New York Avenue, N.W., Suite 800 • Washington, D.C. 20005-2102 • (202) 347-2279

TESTIMONY OF THE NATIONAL ORGANIZATION FOR WOMEN

presented by
JUDY GOLDSMITH, PRESIDENT

My name is Judy Goldsmith and I am president of the National Organization for Women, the nation's oldest and largest feminist organization with 250,000 members. I appreciate the opportunity to testify today in regard to the nomination of William Bradford Reynolds to become the Associate Attorney General, the third-ranking position in the United States Department of Justice.

For more than two decades, the Department of Justice has been in the forefront of the struggle for civil rights. In the past, it has provided the government with guidelines on the integration of women and minorities into the mainstream of American society. In the past, it has pursued the proper role of government, that of safeguarding the rights and economic well-being of its citizens. And during the past two decades, women and minorities have made significant strides in a number of areas, including education and employment. Laws enacted and enforced over this period of time have guaranteed all citizens the equal opportunities necessary to achieve their potential.

However, Mr. Reynolds has become the Scrooge of the Justice Department. He has been stingy and mean-spirited in dispensing justice to the citizens of this nation. In accordance with this administration's philosophy, Mr. Reynolds has taken a position diametrically opposed to our former national commitment to equality of opportunity for all.

The current administration has shown utter disregard for the very laws that have made so much past progress possible. It has tried at virtually every opportunity to undo the laws that have protected the rights of women and minorities. When it has been unable to weaken or eliminate a law with which it does not agree, it has simply refused to enforce it.

Although there are a number of instances where the Justice Department in general, and Mr. Reynolds in particular, have been at odds with the rights of those they are charged with protecting and with carrying out programs designed to protect the rights of all citizens, I will limit my testimony today to several areas with which the National Organization for Women has been especially involved.

In his present capacity, Mr. Reynolds holds the position of Assistant Attorney General, heading the Justice Department's Civil Rights Division. In that capacity, his name has appeared prominently in the news over the last few years as the administration's chief spokesperson for civil rights policy. Editorial statements have been almost uniformly critical of the way in which Mr. Reynolds, and, indeed, the entire Justice Department, have interpreted long-standing civil rights policies. Chief among these are affirmative action and enforcement of civil rights protections which were challenged and severely weakened in the Supreme Court case Grove City College v. Bell over a year ago. These are two areas in which NOW has had a special interest because of their importance to women.

The term "affirmative action" is used by different people to mean different things. NOW believes it connotes a carefully designed program to create a heightened sensitivity to the needs of people who have suffered discrimination based on their sex, race or national origin, and which enables them to take full advantage of opportunities heretofore denied to them, basing measurement of its success on numerical data. Such an approach has been necessary because mere promises of stopping discriminatory practices have not been sufficient.

The need for affirmative action was articulated by President Lyndon Johnson twenty years ago in a commencement address at Howard University:

> You do not take a person, who for years has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say you are free to compete with all the

> others, and still just believe that you have been completely fair.

In the area of employment, affirmative action may refer to a wide variety of measures including: development by employers of specific policies to ensure equal employment practices that do not have a discriminatory impact, intentional or unintentional; outreach and recruitment programs by employers; monitoring the impact of employment practices on women and minorities and the establishment of numerical goals and timetables for employment or promotion of individuals who belong to a group that has historically suffered discrimination. Any or all of these measures may be applied, since all play a part in going beyond the elimination of discrimination that remains after the more obvious practices or policies have been eliminated.

Women and minorities have made progress through the application of affirmative action, but a great deal more needs to be done. Affirmative action was designed to address the results of inequitable treatment of the past and there has not yet been sufficient access to opportunity to ensure either job security or economic equality with white men. Discrimination based on sex and race still exists in this country and affirmative action is needed quite simply because discrimination is not easily eradicated.

However, shortly after arriving at the Department of Justice during the first Reagan term, Mr. Reynolds announced that affirmative action remedies, which have been approved by the courts, Congress and federal agencies for the last twenty years, would be rejected by the Reagan administration. His refusal to consider historic patterns of blatant discrimination against women and minorities that required the remedial use of affirmative action plans is typical of this administration. Mr. Reynolds made it clear that the Department of Justice would no longer apply the principles of goals and ratios because of the administration's contention that the application of such race-conscious measures would be "preferential treatment" in violation of the Constitution and Title VII of the Civil Rights Act. Mr. Reynolds appears to believe that discrimination is individually based. He does not seem to understand that discrimination occurs simply because one is black or Hispanic or a woman. He believes, apparently, that only individuals directly shown to have been the victims of discrimination are entitled to "make whole" relief. To do otherwise, in his view, would be to aid a whole class or category of people. In his words, "If the racial or sexual composition of a work force is so skewed as to suggest unequal treatment in an employer's hiring practices, the law presumes discrimination. But it does not permit repairing that discrimination once established by continued (emphasis his) unequal treatment on the part of the employer in its hiring practices," or, as he stated on another occasion, "More discrimination is simply not the way to end discrimination."

Mr. Reynolds seems to have difficulty distinguishing between discrimination and the redress for two hundred years of being denied one's civil rights simply because one is a member of a disadvantaged group.

To insist, as Mr. Reynolds does, that discrimination that has existed for the past two centuries should be corrected "one person at a time" is logically inconsistent and morally untenable. The black man was discriminated against not because he was Joe Smith, but because he was black. The woman was discriminated against not because she was Mary Doe, but because she was a woman. Minority women, of course, labor under the burden of double discrimination.

Mr. Reynolds' view of proper redress only for "direct" victims of discrimination is insensitive and short-sighted. It is easy to agree that a woman turned down for a job in favor of a less qualified man is the "direct," "identifiable" victim of discrimination. But is that woman's child, raised in poverty, without decent meals, warm clothes, books, adequate parental supervision while his or her mother looks for work of any kind any less a victim of that discrimination?

Mr. Reynolds apparently does not see the reasoning behind goals for hiring members of groups that have been historically the victims of discrimination. He chooses to not understand that unless some employers are faced with sanctions, they will not actively seek out qualified applicants who are minorities or women. For the disenfranchised, advances don't just happen; they must be assertively pursued.

The Reagan administration says that it favors a "colorblind" approach, rather than admitting that it does not support past policies which have been proven effective in bringing more women and minorities into the workplaces and educational institutions that were previously off-limits to them. By using the code word "colorblind" the administration is merely substituting illusion for reality; we sincerely hope that we are on our way to a society that is indeed colorblind, but we are certainly not there yet. The very reason behind the civil rights laws' original passage was the denial of basic civil rights to some Americans and the need for affording these same people those rights.

In the summer of 1984, the Supreme Court ruled in the _Firefighters Local Union No. 1784 vs. Stotts_ case that white firefighters in Memphis would not be laid off in order to protect black hiring and promotion gains under a court ordered affirmative action plan. The case hinged on the seniority of the workers, but one must acknowledge the reason that some workers had seniority was that women and minorities were excluded from being hired before affirmative action plans were put into effect.

Not content to allow progress to continue under a policy it opposes -- even one that is working -- on April 2 of this year, the Justice Department announced that some 52 counties, cities and states must eliminate from their affirmative action plans the use of numerical goals and quotas intended to increase employment of minorities and women. According to the Department, such policies were unacceptable under Title VII of the Civil Rights Act of 1964. Mr. Reynolds, on behalf of the Department, sent letters to the public employers mentioned above, including the Indianapolis fire and police departments and the New York state police, requesting that they urge the Federal courts to amend the court decrees underlying their affirmative action plans. It used the _Stotts_ case as a basis for its action. That the Justice Department's reading of the _Stotts_ case is far too broad is not only the view of the National Organization for Women, but that of such others as New York State

Attorney General Robert Abrams who announced that New York State will not modify its successful affirmative action policy. Indianapolis Mayor Richard Hudnut, a Republican, issued a similar statement. In referring to the affirmative action plan followed by Indianapolis, Mayor Hudnut said, "It is useful for the city, and we shall continue to work under it." Yet the Justice Department and Mr. Reynolds seem willing to threaten progress and the well-being of millions of American citizens in order to inflict their own narrow ideology on the rest of us.

Affirmative action is intended to undo historic and present discrimination, some of it subconscious and some of it built into our institutions. It is not, as Mr. Reynolds has said, intended to create a "racial spoils system." This reference was a particularly callous and unsubtle attempt to divide and conquer the constituencies at the bottom of the economic heap. Its obvious intent is to get women, minorities and the economically disadvantaged to view each other as enemies so that we don't see them.

One area where discrimination is built in is the persistent wage gap between what men are paid and what women are paid. I am referring to the concept of pay equity.

There is no economic issue of more importance to NOW than pay equity because there is no other issue that potentially impacts women more significantly. It is crucial to women's economic well-being. A recent poll commissioned by the National Committee on Pay Equity showed that people understand that women suffer from employment discrimination. Sixty-nine percent of the public agree that women are not paid fairly for the work they do; 83% say that the wage gap between men and women is a serious problem and 61% believe that if most jobs were held by men, "the jobs would pay a lot better than they do." It is clear that people overwhelmingly approve of removing sex as a rating factor in wage setting.

Pay equity is neither a new nor radical idea, nor is it one with a history of partisanship. President Dwight Eisenhower urged Congress to pass the Green-Rogers Equal Pay bills thirty years ago "as a matter of simple justice." This bill would have required equal pay for comparable work and suggested that the value of a job could be determined by considering such factors as experience and training, responsibility, physical effort and working conditions. The National Organization for Women is continuing that struggle today with support from both sides of the aisle in both houses of Congress as well as throughout the country, and we will not stop until we win.

The entire Reagan administration, however, is forming a united front to block progress in this area, as it has in so many other areas that mean progress for women. The Equal Employment Opportunity Commission (EEOC), the principle agency responsible for investigating job discrimination and enforcing equal opportunity regulations, has refused to process pay equity discrimination charges despite the 1981 Gunther v. County of Washington Supreme Court decision clearly establishing Title VII jurisdiction over sex-based wage discrimination claims involving equal pay for work of comparable value. The United States Civil Rights Commission chair, and Reagan appointee, Clarence Pendleton has denigrated pay equity as a "loony tune" idea and expressed his hope that the AFSCME v. State of Washington decision regarding discriminatory pay of state workers be reversed on its current appeal before the Ninth Circuit Court. Attorney General Edwin Meese recently announced that the Justice Department intends to intervene in court against the state workers (primarily women) who were found to have been discriminated against in AFSCME. Its intervention came as no surprise to those of us who are aware of this administration's reprehensible record on civil rights, but the timing of the announcement was interesting. It had been delayed for over a year on political, not substantive, grounds as the administration sought to minimize the potential electoral backlash of such a move. The White House has not repudiated any of these statements or decisions by its representatives, thus signalling its tacit approval.

The Justice Department's decision on AFSCME is only one example of the federal government siding with the discriminators. At the time of Judge Tanner's ruling in the AFSCME case, Mr. Reynolds offered the opinion that Judge Tanner had ruled incorrectly, although Mr. Reynolds had not seen the materials used in the case. In the role of third-ranking offical at the Department, he would no doubt be called upon for his opinion of future decisions in similar matters. Given his past comments and perspective on civil rights and the administration's role in enforcing civil rights protections, we have no reason to hope that he would have disagreed with Mr. Meese in this instance or that he will disagree with Mr. Meese and Mr. Reagan in the future.

Another area in which NOW is diametrically opposed to Mr. Reynolds' and the Reagan administration's philosophy was embodied in the Grove City College v. Bell Supreme Court decision in February 1984. In that decision, the Supreme Court severely narrowed the coverage of Title IX of the Education Amendments of 1972 by ruling that federal anti-discrimination laws in educational institutions applied only to the specific program or department receiving federal funds. Although the decision only directly addressed Title IX, the language with which the Court took issue was patterned after Title VI of the Civil Rights Act of 1964 and similar to that contained in the Age Discrimination Act of 1975 and Section 504 of the Rehabilitation Act of 1973. As a result of the Court's action, millions of individuals -- elderly, women, the physically and mentally challenged and minorities -- are at risk. Already over 60 cases involving Title IX have been closed or put on "policy hold" within the Department of Education alone since the Court's decision, and we are only talking about the effect the decision has had in one year.

Mr. Reynolds has been quoted in the past as saying that "we cannot tolerate a society where we are going to condemn discrimination on the one hand and condone discrimination on the other hand"; yet, by allowing the Court's ruling to stand, we will be doing precisely that. Mr. Reynolds apparently endorses the bizarre view that discrimination should not be challenged if it occurs in buildings not constructed with federal funds or in departments which receive no direct federal aid. Thus, a woman pursuing a college career could be freely discriminated against in the Biology Department, but not in the English Department; in the administration building, but not in the dormitory.

Mr. Reynolds' approval of the Supreme Court decision does not come as a surprise to us. He has long been vocal about his narrow view of the reach of civil rights laws. The Supreme Court merely reaffirmed his own view of how these laws should be interpreted.

Immediately following the Court's decision, proponents of civil rights protections introduced legislation to correct the Court's misinterpretation of congressional intent embodied in Title IX and the other three civil rights statutes. The remedial legislation, the Civil Rights Act of 1984, did nothing to expand the laws as we understood them prior to the Court's action; it merely restored their scope and coverage so that their spirit of nondiscrimination could be enforced.

The administration stated at that time that it, too, was interested in correcting the Court's action, but only for Title IX and education because that was all the Court stated explicitly in its decision. However, proponents understood the demagoguery. Mr. Reynolds, in his capacity as the head of the civil rights division within the Justice Department and, we assume, acting with the administration's approval, announced that he would apply the same narrowing of the law called for by the Court's decision to the other three civil rights statutes the proponents had included in the remedial legislation.

The House of Representatives understood the urgent need for the legislation and held hearings at which a number of organizations representing affected groups, including the National Organization for Women, as well as officials of past administrations testified. Virtually all of the former officials, including the former heads of the civil rights division of the Justice Department -- Mr. Reynolds' predecessors -- testified that they had interpreted and enforced the four statutes in exactly the manner proponents of the legislation claimed. These officials represented both Republican and Democratic administrations -- Presidents Johnson, Nixon, Ford and Carter -- and all agreed that the Grove City decision did indeed narrow the laws as originally passed by Congress. The only administration that has repudiated Congress' intent in regard to the four statutes is the Reagan administration, and its chief civil rights law officer, Mr. Reynolds.

Despite the House of Representatives' overwhelming passage of the law with minor changes, the Senate killed the bill before the end of the session. Proponents of civil rights once again introduced legislation to reverse the Court's ruling in Grove City and its damaging effects at the beginning of this year. The legislation, once again, has garnered widespread, bi-partisan support in both the House and the Senate.

The House of Representatives has held extensive hearings on the pending bill, the Civil Rights Restoration Act, at which both Mr. Reynolds and I testified. The National Organization for Women believes that the administration's opposition to the Restoration Act represents a frontal attack on legal protection for the rights of women, minorities, the elderly and the disabled. It is clearly the administration's intent to return us to the "good old days" when the "good old boys" controlled everything without let or hindrance. Such an attitude is perfectly consistent in an administration which has conscientiously safeguarded the rights and privileges of the rich, the white, and the male. However, in a nation that claims to be dedicated to equal opportunity for all, it is unconscionable and unacceptable.

In his testimony before the House committees with jurisdiction over the Civil Rights Restoration Act in March of this year, Mr. Reynolds said that the pending bill (HR.700/S. 431) was overly broad; he likened the legislation to the "killing of a gnat with an elephant gun." The National Organization for Women, and the over 90 other organizations supporting the legislation, do not equate civil rights protections with an insignificant but irritating insect, nor the legislation with over-kill. Mr. Reynolds announced his intention to use the Grove City decision in more than "a Title IX only" manner; he himself should understand the need for more than "a Title IX only" remedy for the Court's action.

In his attempt to minimize the impact of the Grove City decision, Mr. Reynolds further testified that he was not aware of an "articulated reason for taking such drastic action other than the Grove City decision and its possible adverse impact on women's college athletic programs." He obviously has not been informed of or has ignored the closing of a case that had been filed with the Office of Civil Rights (OCR) involving the sexual harassment of a female college student at Northeastern University. Although the University had received over $2 million under the College Housing Loan Program, as well as $9.9 million in student aid for that academic year, because the alleged discrimination (sexual harassment, covered by Title IX) had taken place in a building not built or renovated with federal funds, the OCR decided it could not investigate. It is interesting to note that prior to the Grove City decision, the OCR only had to determine that the educational institution in question had received federal funds in order for an investigation into the complaint to be triggered: now it must determine whether federal funds go to the program or building in which discrimination is charged. This interpretation is indeed narrower than before.

Mr. Reynolds has shown his disdain and contempt for the very people whose rights he and his division at the Justice Department are charged with protecting. He has shown his agreement with the Reagan administration's preference to erode rather than uphold the law. This administration's attitude toward those people who make up this ethnically-diverse and pluralistic nation is simply arrogant. The Justice Department since 1981 has been that in name only. In reality, it has systematically and consistently tried to return this country to an era when there was justice for some, no justice for others, and, therefore, there was no justice. We will not tolerate the current administration's repudiation of a national commitment to fairness and equal opportunity.

In his testimony earlier this year on the Civil Rights Restoration Act, Mr. Reynolds said that he was not there that day to detail the Justice Department's "remarkable" record of civil rights enforcement over the past four years -- that that was for another day. I believe that day has come and it is now. Mr. Reynolds should fully detail for us the administration's record on civil rights because that record is indeed worthy of remark -- although not in the way Mr. Reynolds means.

We are all aware that regulations and policies are only as good as their enforcement and implementation, and this administration, of which Mr. Reynolds is so visible and vocal a part, has shown no willingness to either implement established policies nor enforce laws with which it does not agree.

Mr. Reynolds' grasp of the reason for civil rights laws is either incomplete or deliberately inaccurate. By refusing to acknowledge that Congress intended the reach of civil rights laws to be broad and generous, he is reinforcing his own narrow view of the world by shutting his eyes to over twenty years of gradual progress in the direction of equal treatment under the law. Mr. Reynolds has made some of the most discriminatory, anti-woman, anti-black statements I have heard in a decade. He has proven time and again that he is prepared to do away with policies that were achieved only after great suffering and sacrifice; policies that have won the approval of Congress, the courts and the American people. We do not believe that the Congress should bestow upon such a person the power and high office that we are considering here today.

The National Organization for Women unequivocally opposes the confirmation of William Bradford Reynolds to the position of Associate Attorney General.

Thank you for the opportunity to appear before you today.

The **Chairman**. Mr. Kapp?

STATEMENT OF ROBERT KAPP

Mr. **Kapp**. Mr. Chairman, thank you for the opportunity to appear before this committee. I am Robert Kapp of Washington, DC., Co-Chair of the Lawyers Committee for Civil Rights Under Law. I am appearing today on behalf of over 80 members of the board of directors of the lawyers committee.

The membership of the lawyers committee in its over-20-year history has never previously opposed the nomination of a Federal Government official. We do so today. We oppose the nomination of William Bradford Reynolds to be Associate Attorney General.

Mr. Reynolds' record as Assistant Attorney General for Civil Rights reflects an abdication of responsibility for the enforcement of civil rights, and even more disturbing a disregard for the rule of law as it governs those rights.

The written statement we have submitted describes the Civil Rights Division's actions under Mr. Reynolds and sets forth reasons why we think those actions are not only wrong, but inconsistent with the Department's obligation to enforce the law.

Let me focus on three illustrations. One of the most disquieting instances of the administration's and Mr. Reynolds' lack of commitment to civil rights and indifference to the law was their effort to grant tax-exempt status to schools that discriminate on the basis of race. In doing so, they attempted to reverse Internal Revenue Service policy that had been settled for years. The Supreme Court in *Bob Jones* firmly rejected the administration's position, presented by Mr. Reynolds himself in oral argument. The unfortunate picture of the Nation's chief civil rights enforcement official defending the right of a school that practices racial discrimination to receive a tax exemption, in effect, a subsidy from the national Treasury, bears on Mr. Reynolds' nomination.

The Government's 1982 actions evince an antagonism to vigorous civil rights enforcement and an indifference to established law. That indifference is not appropriate to any high-ranking Justice Department official.

Mr. Reynolds' approach to school desegregation is another example of abdication of his responsibility to enforce the civil rights law. The methods of achieving school desegregation mandated in *Brown*, after years of frustration, were finally established by the Supreme Court in the *Swann* and *Green* cases. These cases have been ignored by Mr. Reynolds' Civil Rights Division.

Seventeen years ago, a unanimous Supreme Court in *Green* made it clear that voluntary school desegregation plans were inadequate to fulfill the promise of equal education opportunity and should not be relied upon. Just 3 years later, an equally unanimous Supreme Court in *Swann* made it clear that pupil assignment and transportation were normal and accepted remedies. The Court held that such pupil assignment plans are "absolutely essential to the fulfillment of the school board's Constitutional obligation" to desegregate, and that "it is unlikely that a truly effective remedy could be devised without continued reliance upon them."

Mr. Reynolds, in sharp contrast, has made clear that he rejects such measures. I quote him: "We are not going to compel children who do not choose to have an integrated education to have one," Mr. Reynolds has said, explicitly ignoring the Supreme Court's clear insistence on mandatory measures if necessary for school desegregation. The refusal to employ mandatory measures even as a last resort is nothing more than a return to "separate but equal."

A final example of Mr. Reynolds' unwillingness to enforce the civil rights laws is his refusal to employ race-conscious remedies in employment discrimination cases. Mr. Reynolds has insisted that remedies be colorblind, despite clear rulings by both the Supreme Court and every court of appeals that has passed on the issue that color blindness is ineffective.

As Justice Blackmun said in the *Bakke* case: "In order to get beyond racism, we must take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently."

The Civil Rights Division under Mr. Reynolds has not only declined to pursue——

The CHAIRMAN. Your time is up.

Mr. KAPP. I would just like to say, Mr. Chairman, that the lawyers committee opposes the nomination of William Bradford Reynolds as Associate Attorney General.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

[Statement follows:]

LAWYERS' COMMITTEE
FOR CIVIL RIGHTS UNDER LAW

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This statement, accompanying the testimony of Thomas D. Barr, is submitted on behalf of the members of the Board of Trustees of the Lawyers' Committee for Civil Rights Under Law who are listed at Appendix A.

The Lawyers' Committee was organized in 1963 at the request of President John F. Kennedy in order to bring the resources of the private bar to bear on solving our nation's civil rights problems. Presidents Lyndon B. Johnson, Richard M. Nixon, Gerald R. Ford and Jimmy Carter asked the Committee to continue its work. The Committee's members include Democrats and Republicans, liberals and conservatives. Some of our members have served in government as United States Attorneys General and Assistant Attorneys General and in other positions; others have remained in private practice. All of our members are committed to the rule of law.

The Lawyers' Committee began its work in Mississippi, where its participating law firms handled dozens of important civil rights cases. Beginning in 1968, it expanded throughout the country in order to bring lawyers and law firms into the effort to solve the problems identified by the National Advisory Commission on Civil Disorders, the Kerner Commission. Since then, cooperating law firms have been involved in important civil rights cases in education, housing, voting and employment throughout the country.

The Lawyers' Committee is committed to vigorous civil rights enforcement and fidelity to the rule of law.

I.

The national consensus supporting a vigorous effort to overcome centuries of injustice has been firm and clear, and the record of the Administrations since Brown v. Board of Education, 347 U.S. 483 (1954), has largely been favorable to the vigorous promotion of our national commitment to equality and social justice. In the words of Attorney General Frank Murphy in 1939, when he established a civil rights section, the Department of Justice should provide "aggressive protection of the fundamental rights inherent in a free people." Attorney General Herbert Brownell, Jr., played a vital role in enactment of the Civil Rights Act of 1957, the first civil rights act since Reconstruction, and President Dwight D. Eisenhower sent troops to Little Rock, Arkansas to enforce the rule of law and desegregate the Little Rock schools; Presidents Kennedy and Johnson sponsored the Civil Rights Acts of 1964, 1965 and 1968; President Nixon's Administration proposed the Philadelphia plan and supported strengthening Title VII by extending its prohibition on employment discrimination to state and local governments; and the Administrations of Presidents Ford and Carter vigorously enforced these Acts.

Accordingly, since its inception in 1963, through two decades of both Democratic and Republican Administrations, the Lawyers' Committee and the Department of Justice have, with only a few exceptions, taken parallel positions in the pursuit of equality and social justice. 1/ Thus, under previous Administrations, the Lawyers' Committee did not take a position with respect to specific nominations.

In a sharp break with the past, however, the current policies and practices of the Department of Justice, and specifically its Civil Rights Division, under the leadership of William Bradford Reynolds, have taken directions that do not adequately support, and in many instances undercut, the civil rights of minorities. As a result of

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1/ The Lawyers' Committee appeared and argued orally in opposition to the position of the Justice Department in Alexander v. Holmes County Board of Education, 396 U.S. 19 (1969).

those policies, the Lawyers' Committee and lawyers affiliated with it now find themselves in a novel and regrettable position. In increasing numbers of civil rights cases throughout the country, where we represent the interests of minorities and women, we are encountering for the first time the fervent and vigorous opposition of the Federal Government.

Our concern over the policies of the Civil Rights Division under Mr. Reynolds runs far deeper than any differences of opinion in a few isolated cases; it runs deeper than any simple dispute over Administration policy. The record of the present Administration in civil rights--Mr. Reynolds's record--reflects an abdication of responsibility for the enforcement of civil rights and, even more disturbing, a disregard for the rule of law as it governs those rights.

The Department of Justice is not merely another agency. Its officials have the high duty of vigorously enforcing the law, regardless of whether they or the President agree with it. If the Administration disagrees with laws enacted by Congress, its recourse is to seek to change those laws. In the area of civil rights, where Mr. Reynolds has had the principal responsibility, the present Administration has neither enforced the Nation's laws nor properly sought to change them. As we set out below, it has largely ignored them.

Approximately one year ago, a similar group of Lawyers' Committee Directors and Trustees appeared before this Committee for the first time to comment on a Cabinet nomination, urging the Committee, in considering the nomination of Edwin Meese, III, as Attorney General, to consider his record in the area of civil rights and to assure itself that under his leadership the Department of Justice would retain its historic commitment to the vigorous enforcement of equality and social justice for minorities.

Now we, as concerned lawyers, are compelled, for the first time ever, directly to oppose the nomination of a Federal Government official. We oppose the nomination of Mr. William Bradford Reynolds as Associate Attorney General. Mr. Reynolds's record as head of the Civil Rights Division has been characterized by a troubling unwillingness to enforce, in protection of the rights of minorities, the very constitutional principles and statutes that are his mandate. Equally troubling have been the efforts of the Civil Rights Division to dismantle the remedies that previous Administrations, both Democratic and Republican, have sought and obtained on behalf of minorities.

The Associate Attorney General occupies a high and prominent position in the enforcement of our Nation's laws. It has been suggested that the Associate Attorney General will, among other duties, exercise supervision over the

Civil Rights Division. The position of the Associate Attorney General requires the firmest commitment to enforcing the law and the most scrupulous adherence to the rule of law. We believe that Mr. Reynolds has not demonstrated these qualities. We therefore urge this Committee, regretfully but in the strongest possible terms, to recommend that Mr. Reynolds not be confirmed as Associate Attorney General.

II.

We now turn to the record of the Civil Rights Division under the stewardship of Mr. Reynolds. We identify below numerous instances of actions or positions taken by Mr. Reynolds and the Division that indicate an abdication of their legal mandate to enforce the civil rights of minorities and women and a failure to follow the rule of law.

Our conclusions about Mr. Reynolds's policies can be summed up briefly:

1. In some areas, clear and well-established law has been ignored and overridden, in violation of the obligation faithfully to execute the law.
2. In some areas, efforts have been made to weaken or change the law in a manner that would impede the progress of minorities toward equality under law.
3. In some areas, enforcement of the law has been lax or virtually non-existent.

EDUCATION

A. Tax Exemptions for Discriminatory Schools.

One of the most disquieting instances of this Administration's and Mr. Reynolds's apparent hostility to civil rights and indifference to the law was their effort to grant tax-exempt status to schools that discriminate on the basis of race. The matter has now been definitively settled by decision of the United States Supreme Court in Bob Jones University v. United States, 461 U.S. 574 (1983). The Court firmly rejected the Administration's position, presented by Mr. Reynolds in his oral argument.

In 1975, the IRS formally withdrew tax-exempt status from Bob Jones University, based on the agency's policy against exemptions for discriminatory institutions, a consistent agency policy going back to 1971, and based on a three-judge court decision summarily affirmed by the Supreme Court. Green v. Connally, 330 F. Supp. 1150 (D.D.C.), aff'd per curiam, 404 U.S. 997 (1971). When Bob Jones University challenged the IRS decision, the Department of Justice originally adopted its traditional stance of supporting agency action, which in this case also promoted civil rights enforcement, and the Fourth Circuit firmly upheld the IRS, 639 F.2d 147 (4th Cir. 1981) (per curiam). The Department of Justice, however, persuaded the Treasury Department in

1982 to change its position and urged the Supreme Court to dismiss the University's appeal from the Fourth Circuit ruling as moot, 461 U.S. at 585 n.9. This request to the Court was made over the objections of both the Acting Solicitor General and some top Treasury Department officials. N.Y. Times, Feb. 3, 1982, pp. A1, A2. Despite Mr. Reynolds's assertions that the policy switch was an "absolutely correct legal decision" (N.Y. Times, Feb. 18, 1982, at A11, col. 1), the Court refused to dismiss the case and emphatically rejected the Justice Department's position on the merits.

This unfortunate picture of the nation's chief civil rights enforcement official defending the right of a school that practices racial discrimination to receive a tax exemption--in effect, a subsidy from the national treasury--bears on Mr. Reynolds's nomination. It evinces a hostility to vigorous civil rights enforcement. It also evinces an indifference to established law. That indifference is not appropriate to any high-ranking Justice Department position.

B. School Desegregation.

Methods of achieving the school desegregation mandated in Brown v. Bd. of Educ., 347 U.S. 483 (1954), after years of frustration, were developed in Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971), and Green v. City School Bd. of New Kent County, 391 U.S. 430

(1968). Each of these cases has been disregarded by Mr. Reynolds's Civil Rights Division.

Seventeen years ago, after over thirteen years of unsuccessful attempts at desegregation by voluntary means, a unanimous Supreme Court made it clear that voluntary plans were inadequate to fulfill the promise of equal educational opportunity and should not be relied upon. Green v. City School Bd. of New Kent County, 391 U.S. 430 (1968). "[I]f there are reasonably available other ways [than voluntary programs], . . . promising speedier and more effective conversion to a unitary, nonracial school system, 'freedom of choice' must be held unacceptable." Id. at 441.

Just three years later, an equally unanimous Court, led by Chief Justice Burger, made it clear that pupil assignment and transportation were "normal and accepted" remedies. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 29 (1971). And in North Carolina Bd. of Educ. v. Swann, 402 U.S. 43 (1971), the Court unanimously held unconstitutional a statute barring race-conscious pupil assignment and transportation plans. The Court held that such pupil assignment plans are "absolutely essential to fulfillment of [school boards'] constitutional obligation" to desegregate and that "it is unlikely that a truly effective remedy could be devised without continued reliance upon [them]." 402 U.S. at 46. The Court has, since that time, consistently declined to review Court of Appeals decisions requiring or approving school desegregation orders utilizing mandatory reassignment and public transportation. 2/

Mr. Reynolds, in sharp contrast, has made clear his absolute hostility toward such measures. "We are not going to compel children who don't choose to have an integrated education to have one," Mr. Reynolds has said, explicitly ignoring the Supreme Court's clear insistence in Swann and North Carolina Board of Education on mandatory

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2/ E.g., Hoots v. Commonwealth of Pennsylvania, 672 F.2d 1107 (3d Cir.), cert. denied, 459 U.S. 824, 877 (1982); Martin v. Charlotte-Mecklenburg Bd. of Educ., 626 F.2d 1165 (4th Cir. 1980), cert. denied, 450 U.S. 1041 (1981); Lee v. Demopolis City School System, 557 F.2d 1053 (5th Cir. 1977), cert. denied, 434 U.S. 1014 (1978); Morgan v. Kerrigan, 530 F.2d 401 (1st Cir.), cert. denied, 426 U.S. 935 (1976); Medley v. School Bd. of Danville, 482 F.2d 1061 (4th Cir. 1973), cert. denied, 414 U.S. 1172 (1974); Clark v. Board of Educ., 465 F.2d 1044 (8th Cir. 1972), cert. denied, 413 U.S. 923 (1973), 449 F.2d 493 (8th Cir. 1971), cert. denied, 405 U.S. 936 (1972), 426 F.2d 1035 (8th Cir. 1970), cert. denied, 402 U.S. 952 (1971); Dowell v. School Bd. of Oklahoma City, 465 F.2d 1012 (10th Cir.), cert. denied, 409 U.S. 1041 (1972); Ellis v. Board of Public Instruction, 465 F.2d 878 (5th Cir. 1972), cert. denied, 410 U.S. 966 (1973); Kelly v. Guinn, 456 F.2d 100 (9th Cir. 1972), cert. denied, 413 U.S. 919 (1973); Northcross v. Board of Educ. of Memphis, 466 F.2d 890 (6th Cir. 1972), cert. denied, 410 U.S. 926 (1973); Diaz v. San Jose Unified School Dist., 733 F.2d 660 (9th Cir. 1984), cert. denied, 53 U.S.L.W. 3776 (U.S. April 30, 1985); Tasby v. Estes, 572 F.2d 1010 (5th Cir. 1978), cert. dismissed as improvidently granted, 444 U.S. 437 (1980).

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Mr. Reynolds, in sharp contrast, has made clear his absolute hostility toward such measures. "We are not going to compel children who don't choose to have an integrated education to have one," Mr. Reynolds has said, explicitly ignoring the Supreme Court's clear insistence in Swann and North Carolina Board of Education on mandatory

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2/ E.g., Hoots v. Commonwealth of Pennsylvania, 672 F.2d 1107 (3d Cir.), cert. denied, 459 U.S. 824, 877 (1982); Martin v. Charlotte-Mecklenburg Bd. of Educ., 626 F.2d 1165 (4th Cir. 1980), cert. denied, 450 U.S. 1041 (1981); Lee v. Demopolis City School System, 557 F.2d 1053 (5th Cir. 1977), cert. denied, 434 U.S. 1014 (1978); Morgan v. Kerrigan, 530 F.2d 401 (1st Cir.), cert. denied, 426 U.S. 935 (1976); Medley v. School Bd. of Danville, 482 F.2d 1061 (4th Cir. 1973), cert. denied, 414 U.S. 1172 (1974); Clark v. Board of Educ., 465 F.2d 1044 (8th Cir. 1972), cert. denied, 413 U.S. 923 (1973), 449 F.2d 493 (8th Cir. 1971), cert. denied, 405 U.S. 936 (1972), 426 F.2d 1035 (8th Cir. 1970), cert. denied, 402 U.S. 952 (1971); Dowell v. School Bd. of Oklahoma City, 465 F.2d 1012 (10th Cir.), cert. denied, 409 U.S. 1041 (1972); Ellis v. Board of Public Instruction, 465 F.2d 878 (5th Cir. 1972), cert. denied, 410 U.S. 966 (1973); Kelly v. Guinn, 456 F.2d 100 (9th Cir. 1972), cert. denied, 413 U.S. 919 (1973); Northcross v. Board of Educ. of Memphis, 466 F.2d 890 (6th Cir. 1972), cert. denied, 410 U.S. 926 (1973); Diaz v. San Jose Unified School Dist., 733 F.2d 660 (9th Cir. 1984), cert. denied, 53 U.S.L.W. 3776 (U.S. April 30, 1985); Tasby v. Estes, 572 F.2d 1010 (5th Cir. 1978), cert. dismissed as improvidently granted, 444 U.S. 437 (1980).

measures, if necessary, for desegregation. Hearings on School Desegregation before the House of Representatives Subcommittee on Civil and Constitutional Rights, Committee on the Judiciary, 97th Cong., 1st Sess., p. 631 (November 19, 1981) (hereinafter "Nov. 1981 Hearings"). Instead, Mr. Reynolds has opted for equal access to resources and staff for segregated students. Nov. 1981 Hearings 632. The refusal to employ mandatory remedies, even as a last resort, is nothing more than a return to "separate but equal."

The Bakersfield case illustrates the Department's position. Described by Mr. Reynolds as a "blueprint for desegregation," it was more accurately characterized by the New York Times as a "blueprint for evasion and for continuing the Administration's lax approach to school desegregation", N.Y. Times, Feb. 1, 1984, at A26, col. 1. In Bakersfield, Mr. Reynolds has agreed to a plan that depends almost entirely on instituting "magnet programs" in four minority schools. No enforcement procedures are prescribed in the event the voluntary methods prove to be ineffective, unlike the plan adopted in Cincinnati on February 16, 1984, which calls for the use of mandatory measures if the voluntary approach fails. 3/ Settlement Agreement at 5, Bronson v. Board of Education of Cincinnati, C-1-74-205 (S.D. Ohio). When criticized for ignoring the Supreme Court's explicit repudiation of "freedom of choice" plans in Green, Mr. Reynolds reportedly responded that the Bakersfield settlement satisfied constitutional standards because there had been no intentional segregation. N.Y. Times, Feb. 12, 1984, at 28, col. 1. But as far back as 1978, an administrative law judge issued a 220-page ruling that black and Hispanic students had been intentionally segregated from whites by deliberate practices that included busing to maintain segregation. In re Bakersfield City School District, California, Docket No. S-99 (Department of Health, Education and Welfare and National Science Foundation, Jan. 12, 1978).

The centerpiece of the Civil Rights Division's school desegregation policy has been a refusal to urge or

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3/ Similarly, in a school case originally brought by the Justice Department, in which the Lawyers' Committee was forced to intervene on behalf of black school children and their parents because the government refused to take action to end continued elementary school segregation, Mr. Reynolds has proposed a purely voluntary, "magnet" approach--and has suggested that after three years under such a plan, the case should be dismissed whether or not racially imbalanced schools have been eliminated. Proposed Consent Decree, United States v. Hattiesburg Municipal Separate School Dist., Civ. No. 4706 (S.D. Miss., submitted July 17, 1984).

accede to the use of busing to desegregate schools that were illegally segregated. "I am opposed to busing", Mr. Reynolds has said. "I wouldn't use it as a last resort because it doesn't seem to me to make sense as a last resort to put in place something that has been such a failure." Wash. Post, Dec. 5, 1983, at A1. The Administration may deplore the use of this remedy, but the head of the Civil Rights Division is sworn to enforce the law. And it is the indisputable law of the land that children wrongly denied equal educational opportunity by deliberate segregation are entitled to whatever remedy is necessary to correct that condition. It is equally undisputed that the Supreme Court and the lower courts have ruled that busing must be used where necessary. See, e.g., Swann; North Carolina Board of Education; Columbus Board of Education v. Penick, 443 U.S. 449, 468 (1979) (Burger, C.J., concurring). For Mr. Reynolds to forego use or advocacy of this remedy is to deny these children their legal right to an adequate remedy.

Mr. Reynolds has not limited his opposition to busing to a refusal to support busing plans in new desegregation cases. In the Norfolk schools case, he went further. The Civil Rights Division intervened to support the abandonment of a previously ordered busing plan.

At issue was whether the Norfolk school system, after a long history of intentional public school segregation, may drop a busing system imposed by court order in 1971 and return to a neighborhood school system. The school system had a long history of de jure segregation. From the late 1950's to the early 1970's Norfolk strongly resisted legal efforts to desegregate its public schools. When a District Court first ordered 17 black students assigned to formerly all-white public schools, the high schools and junior high schools to which these students were assigned were ordered closed by state and city officials. In 1983, after more than a decade of compliance with the court-ordered desegregation plan, the Norfolk school board voted to eliminate busing at the elementary school level.

Plaintiffs argued that this action would have the effect of resegregating the elementary schools. The school board's own statistics show that if busing is eliminated, ten of the elementary schools will be over 90 percent black. Despite these facts, Mr. Reynolds argued in an amicus brief and in oral argument that the school board was free to abandon court-ordered busing, that Norfolk's extensive history of intentional school segregation was irrelevant, and that because the school board had for a period of time complied with a court order (imposed by virtue of its prior violations), plaintiffs could not block the elimination of busing unless they proved that the school board was racially motivated (which the school board denied). Brief of United

States as Amicus Curiae at 2, 37-41, Riddick v. School Bd. of Norfolk, No. 34-7412 (4th Cir. argued Jan. 8, 1985); Wash. Post, Jan. 9, 1985, p. B1. Mr. Reynolds's theory--that once having implemented court-ordered plans for several years, school boards are then free, by returning to a neighborhood school system, to recreate the same pattern of segregation previously adjudicated to be the result of intentional discrimination--completely undermines realization of the rights declared in Brown. See Vaughns v. Board of Education of Prince Georges County, No. 83-2048(L) (4th Cir. March 28, 1985).

In a similar move, the Civil Rights Division has submitted a memorandum in Keyes v. School District No. 1, Denver, arguing that a school district's good faith implementation of a court order, no matter how ineffective, should end the district court's remedial supervision. Mem. of United States as Amicus Curiae on Def. Motion of Jan. 19, 1984, at 7, Keyes v. School District No. 1, Denver, No. C-1499 (D. Colo. 1977).

The Civil Rights Division under Mr. Reynolds has gone to considerable lengths to eliminate mandatory reassignment and busing plans, often switching sides in cases and opposing remedies it had previously supported. In one case in which the government had earlier intervened as a plaintiff to support comprehensive student desegregation, Mr. Reynolds commissioned the preparation by a political scientist of an all-voluntary, "magnet" plan, which the school board itself refused to adopt. See Davis v. East Baton Rouge Parish School Bd., 721 F.2d 1425, 1430, 1434 (5th Cir. 1983). In Washington v. Seattle School District, 458 U.S. 457 (1982), the Administration reversed the position it had taken as an amicus curiae in the Court of Appeals, see 633 F.2d 1338 (9th Cir. 1980). It argued in the Supreme Court against the local school district's authority voluntarily to adopt a school desegregation plan. The Supreme Court rejected the government's new position, relying explicitly on its earlier rulings that the government had disregarded. In what is perhaps the most bizarre example, the Justice Department opposed a provision in a higher education case settlement designed to alter the historic all-white character of Tennessee's professional schools--on the ground that the Supreme Court's decision in Firefighters Local Union No. 1784 v. Stotts, 104 S.Ct. 2576 (1984) (see pp. 26-27, infra), barred relief absent a showing that the students now to be admitted to a special pre-professional program were individually identifiable as victims of prior discrimination. See Geier v. Alexander, 593 F.Supp. 1263, 1264-67 (M.D. Tenn. 1984).

Mr. Reynolds has also opposed efforts by black parents to participate in the settlement of a lawsuit calling for the desegregation of the Charleston school system. The lawsuit was filed by the Civil Rights Division in the last days of the Carter administration. After assuming office, Mr. Reynolds took over and joined in negotiations with the school district. In September of 1982, after Mr. Reynolds had made clear that he opposed any form of mandatory busing, black parents in Charleston asked the NAACP Legal Defense and Educational Fund to intervene in the case to present their views to the court. Mr. Reynolds opposed the intervention while negotiations with the school district were going on, saying that the interests of black school children were adequately represented by the Justice Department.

According to the Washington Post, in a 1983 internal memorandum, an attorney in the Civil Rights Division complained to Attorney General William French Smith that Mr. Reynolds had instructed the lawyers to make "those bastards . . . jump through every hoop" before allowing them to intervene. A department spokesman, Judy Pond, defended Reynolds's position by explaining that Reynolds considered the black parents "adversaries" in the case. Wash. Post, Oct. 22, 1983, at A3.

Mr. Reynolds states that he is opposed only to mandatory busing and supports voluntary desegregation. But the Administration, in which Mr. Reynolds holds primary responsibility for civil rights matters, has supported the repeal of the Emergency School Aid Act, which for years provided financial assistance to school districts desegregating voluntarily. See United States v. Board of Education of Chicago, 567 F. Supp. 272, 275-76 (N.D. Ill.), aff'd in part and vacated and remanded in part, 717 F.2d 378, 383-84 (7th Cir. 1983). It was virtually necessary for the District Court in Chicago to hold the Justice Department in contempt before the Administration agreed to fund the voluntary plan Mr. Reynolds had praised so effusively in his November 1981 House testimony. See United States v. Board of Education of Chicago, 588 F. Supp. 132, 237-40, 245-46 (N.D. Ill.), vacated and remanded, 744 F.2d 1300 (7th Cir. 1984), petition for cert. filed, 53 U.S.L.W. 3652 (U.S. Feb. 28, 1985).

Consistent with the approach which the Department of Justice took before the Supreme Court in Grove City College v. Bell, 104 S.Ct. 1211 (1984), Mr. Reynolds has adhered to an unjustifiably narrow interpretation of the coverage of federal antidiscrimination laws and has refused to support legislation that would restore the pre-Grove City meaning of Title VI, Title IX, Section 504 and the Age Discrimination Act. In his testimony before a House of Representatives Committee earlier this year, Mr. Reynolds instead accused supporters of the bill introduced by

Congressmen Hawkins and Rodino of seeking "to use the overturning of Grove City as a vehicle for expanding to the fullest extent possible the reach and role of the federal bureaucracy into every facet of the public and private affairs of all our citizens." 4/ Because this aspect of Mr. Reynolds's performance was discussed in the Lawyers' Committee's recent testimony concerning the Grove City bills, we are attaching it as an appendix hereto. See Appendix B.

HOUSING

Housing discrimination remains one of America's severest problems. A 1979 study by the U.S. Department of Housing and Urban Development found that the probability of a black home-seeker encountering discrimination in a search for housing is 75% in the rental market and 48% in the sales market. 5/ Housing discrimination produces residential and

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4/ Statement of Wm. Bradford Reynolds Before the Committee on Education and Labor and Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary Concerning H.R. 700, "Civil Rights Restoration Act of 1985" at 17 (March 7, 1985).

5/ U.S. Department of Housing and Urban Development, Office of Policy Development and Research, Measuring Racial Discrimination in American Housing Markets: The Housing Market Practices Survey ES-2 (1979). A similar HUD study of discrimination against Mexican-Americans in the Dallas rental housing market determined that light-skinned Mexican-school segregation and forces minorities into substandard living conditions. Because forms of discrimination are often subtle, and because private administrative and judicial remedies are so cumbersome, vigorous enforcement by the Department of Justice is indispensable to fulfillment of Congress' remedial objectives.

Under prior Republican and Democratic Administrations, the Department's efforts played a crucial role in furthering those objectives. Between 1969 and mid-1978, when those efforts were largely undertaken by the Nixon and Ford Administrations, the Department brought over 300 cases and 26 enforcement proceedings under the Fair Housing Act of 1968, 42 U.S.C. § 3601, et seq. Although the Department brought complex and difficult cases, it was extremely successful: only two cases were lost on the merits.

During this period, the Department developed basic legal enforcement theories, the most important of which were that a plaintiff need only prove "effects" to make a prima

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Americans were subject to a 65% chance, while dark-skinned Mexican-Americans had a 96% chance, of experiencing discrimination in seeking rental housing. U.S. Department of Housing and Urban Development, Office of Policy Development and Research, Discrimination Against Chicanos in the Dallas Housing Market: An Experimental Extension of the Housing Market Practices Survey (1979).

facie case, 6/ and that a defendant found guilty of discrimination must take affirmative steps to correct the effects of past discrimination. The Department was instrumental in persuading every court that dealt with the issue to adopt the "effects" test. Under Mr. Reynolds's guidance, the Department has refused to use the "effects" test, insisting instead on the need to prove intent. In an effort to persuade courts to require proof of a discriminatory intent, an effort so far unsuccessful, it has changed its position in pending cases. 7/

The Civil Rights Division under Mr. Reynolds has been slow to bring fair housing suits. Between 1980 and 1982, only two cases were instituted. 8/ By the fall of 1983, only six had been brought. 9/ The _Washington Post_ reported at the end of 1984 that although there are about 2 million instances of discrimination in housing per year,

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6/ _E.g._, _U.S. v. City of Black Jack_, 508 F.2d 1179 (8th Cir. 1974), _cert. denied_, 422 U.S. 1042 (1975).

7/ _E.g._, _United States v. City of Birmingham_, 538 F. Supp. 819, 827 n.9 (E.D. Mich. 1982).

8/ Washington Council of Lawyers, _Reagan Civil Rights: The First Twenty Months_, 17 (1982).

9/ M. Sloane, "Federal Housing Policy and Equal Opportunity", in U. S. Comm'n on Civil Rights, _A Sheltered Crisis: The State of Fair Housing in the Eighties_ 133, 141 (1983).

"according to the Department of Housing and Urban Development, 'the Department of Justice has filed suit against 20', choosing cases involving those people who have admitted blacks and who are maintaining integrated communities rather than those . . . who have not admitted blacks". Wash. Post, Dec. 8, 1984, p. F1.

With Mr. Reynolds as its chief civil rights officer, the Department has also abandoned its prior requirement that defendants take affirmative steps to correct the results of housing discrimination, and now asks for little more than a halt to discriminatory practices. [10]

In the area of housing discrimination, the Civil Rights Division under Mr. Reynolds has not only failed to enforce the statutory rights of minorities; it has affirmatively sought to undermine relief that minorities have been able to obtain for themselves. In Shimkus v. The Gersten Companies, Inc., Civ. No. C-83-2141 AJZ (N.D. Cal.), after private litigants brought a class action under Title VIII (the 1968 Fair Housing Act) against the operator of several rental apartment complexes, the government brought its own Title VIII action against the defendant and entered into a Consent Decree, which generally enjoined future discrimination. The parties to the private case have reached an agreement, pursuant to which Blacks on the waiting lists for apartments will, for a limited period of time, be given preference for vacant units in the same proportion as they appear on the waiting list, until parity is reached. 11/ The Civil Rights Division has now moved to intervene in the private suit, alleging that the Stotts decision--an employment case--bars the granting of such relief, even by a Consent Decree, unless the individuals to be given preference are identified as victims of the prior discriminatory conduct by the landlord (that is, were previously rejected applicants).

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[10] See generally N.Y. Times, Dec. 20, 1981, § 4 at 4E, col. 2 (Yonkers, N.Y. litigation).

EMPLOYMENT

Centuries of discrimination have left their mark on the workplace. Women still earn significantly less than their male counterparts in comparable jobs; the black unemployment rate remains stubbornly over twice that of whites, and joblessness among young blacks is three to four times that of young whites. Median black family income is

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11/ Experience under the government decree has produced very little actual integration of the complexes because, as a result of the prior discrimination, whites predominate heeavily at the top of the waiting lists.

about half that of whites; more than one third of black families are below the poverty line.

Ever since 1969, when the Employment Section of the Civil Rights Division was first established under President Nixon, the Department of Justice has instituted or participated in landmark employment discrimination litigation, making vital contributions with respect to both liability and remedy. The policies of the Civil Rights Division under Mr. Reynolds repudiate this effort. Previously, "the landmark decisions sustaining the use of numerical goals and timetables as a remedy for past discrimination were either in cases brought by the Civil Rights Division . . . or in which the Division participated as amicus." 12/ The present Administration, through Mr. Reynolds, has embarked on a radical departure from this course.

Mr. Reynolds has announced on numerous occasions that race-conscious remedies will no longer be sought, and he has urged that employers should virtually ignore the Supreme Court's decision in United Steelworkers of America

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12/ 1972 Civil Rights Commission Report 277 n.76 (quoting memorandum from Chief of Employment Section). See, e.g., United States v. Local 86, Ironmakers, 443 F.2d 544 (9th Cir. 1971).

v. Weber, 443 U.S. 193 (1979), except on the most untenably narrow reading. 13

Mr. Reynolds has insisted that remedies be "color blind", despite clear rulings by both the United States Supreme Court and every Court of Appeals that has passed on the issue, that color-blindness is ineffective. *See, e.g.*, *Vulcan Society v. Civil Service Commission*, 490 F.2d 387, 398 (2d Cir. 1973) ("no other method was available for affording appropriate relief"). As Justice Blackmun said in *Regents of the University of California v. Bakke*, 438 U.S. 265, 407 (1978), "In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently." 14/

13/ Remarks of Wm. Bradford Reynolds Before the 1985 Mid-Winter Meeting of the ABA Labor Section Committee on Equal Employment Opportunity Law as It Affects Labor Relations Development of Law, Practice and Procedure, at 6-13 (March 8, 1985).

14/ A detailed discussion of the practical importance of race-conscious remedies appears in the Statement of the Lawyers' Committee for Civil Rights Under Law on the Fiscal Year 1986 Authorization Request for the Civil Rights Division of the U.S. Department of Justice, delivered April 16, 1985, before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary. A copy of that Statement is submitted herewith as Appendix C.

The Civil Rights Division under Mr. Reynolds has not only declined to pursue race-conscious remedies but has set out expliticly to dismantle affirmative action remedies already in place, remedies sought and obtained by the Civil Rights Division itself. In recent months, the Division has sent letters to over 50 jurisdictions throughout the country, to reopen settled decrees providing for race-conscious remedies. Some of those decrees were entered on consent; others resulted from findings of discrimination. Each decree was sought and obtained by the Government in prior litigation. In each case, the Civil Rights Division now urges that the race-conscious remedies it previously obtained are unlawful under the Supreme Court's recent decision in Firefighters Local Union No. 1784 v. Stotts, 104 S.Ct. 2576 (1984).

In Stotts, the Supreme Court held that it is beyond a court's power under Title VII to order that an employer, over its objection, preserve a percentage of black employees in effecting layoffs, if blacks would otherwise be laid off under a "bona fide seniority system" within the meaning of Section 703(h) of Title VII. The Civil Rights Division, relying heavily on language from the legislative history quoted in the Stotts majority opinion, has attempted to expand that holding into an absolute rule prohibiting, in all circumstances, any form of race-conscious remedy.

We believe that Mr. Reynolds's reading of *Stotts* is untenable. It has been rejected by the EEOC, 15/ as well as by every one of the five appellate courts that have considered the question. 16/

Our concern with Mr. Reynolds's efforts to abolish race-conscious remedies, however, goes beyond the misreading of a particular Supreme Court decision. We are also concerned by his readiness to abandon those very constituencies whom the civil rights laws were principally designed to protect.

The civil rights laws under which the Civil Rights Division is expected to operate were designed in response to

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15/ *See* Letter Brief for the EEOC, July 27, 1984, *EEOC v. Local 638, Sheet Metal Workers Int'l Ass'n*, 753 F.2d 1172 (2d Cir. 1985); Memorandum of Office of the General Counsel, EEOC, June 20, 1984, at 7 ("it is our view that the Supreme Court's decision in *Stotts* does not require the Commission to reconsider its established position that Title VII permits the use of prospective, race-conscious remedies where appropriate to remedy the effects of past race discrimination").

16/ *See* *EEOC v. Local 638, Sheet Metal Workers Int'l Ass'n*, 753 F.2d 1172, 1185-86 (2d Cir. 1985); *Kromnick v. School District of Philadelphia*, 739 F.2d 894 (3d Cir. 1984), *cert. denied*, 105 S.Ct. 782 (1985); *Vanguards of Cleveland v. City of Cleveland*, 753 F.2d 479 (6th Cir. 1985); *Van Aken v. Young*, 750 F.2d 43 (6th Cir. 1984); *Wygant v. Jackson Bd. of Educ.*, 746 F.2d 1152 (6th Cir. 1984), *cert. granted*, 53 U.S.L.W. 3739 (1985); *Diaz v. American Telephone & Telegraph*, 752 F.2d 1356, *1360 n.5* (9th Cir. 1985); *Turner v. Orr*, No. 84-3266 (11th Cir. April 18, 1985).

a history of discrimination against blacks. The principal beneficiaries of those laws were intended to be the historical victims of discrimination. As the Supreme Court stated in United Steelworkers of America v. Weber, 443 U.S. 193, 201-02 (1979): "Title VII must . . . be read . . . against the historical context" and with the understanding that "Congress' primary concern [was with] 'the plight of the Negro in our economy.'"

While emphasizing the rights of white males challenging so-called "reverse discrimination", the Civil Rights Division under Mr. Reynolds has taken comparably little action on behalf of minorities. Thus, Mr. Reynolds has begun the process of reopening more than 50 affirmative action decrees that provide for race-conscious relief. This compares with a yearly average of fewer than fifteen new employment discrimination cases filed on behalf of blacks and women by the Civil Rights Division under Mr. Reynolds.

This emphasis on the rights of white males in derogation of the responsibility to deal with the effects of historical discrimination is illustrated by the role of the Civil Rights Division in a case now on appeal in the Eleventh Circuit, Paradise v. Department of Public Safety, No. 84-7053 (11th Cir). Paradise involves an order entered against the Alabama Department of Public Safety (the State Troopers), requiring temporary one-for-one black-to-white corporal promotions. The order was entered pursuant to a consent decree, after repeated failures by the State Troopers to adopt a nondiscriminatory promotion procedure as required by the decree. The Justice Department has joined in the appeal in Paradise, arguing that the order is unlawful under Stotts.

In its briefs in Paradise, the government discusses at length the unfair effects of race-conscious remedies on white employees. The history behind the order at issue, however, is virtually ignored. That history is highly informative.

In 1972, Judge Frank M. Johnson, Jr., found the State Troopers guilty, since their inception, of a "blatant and continuous practice" of discrimination. Paradise v. Allen, Civil Action No. 3561-N, Order at 3 (M.D. Ala. Feb. 10, 1972). For 37 years there had not been a single black state trooper. Id. Nearly seven years later, there was not a single black corporal. Paradise v. Shoemaker, 470 F. Supp. 439, 442 (M.D. Ala. 1979). At the time of the order appealed from, in late 1983, there were four black corporals in the entire State Trooper system. That Mr. Reynolds chooses to focus on "discrimination" against whites in this case is cause for serious concern.

The disregard for the rule of law shown by the Civil Rights Division under Mr. Reynolds is also deeply disturbing. For example, the United States Court of Appeals for the Second Circuit decided last January that the Stotts decision cannot be interpreted as the Civil Rights Division proposes. EEOC v. Local 638, Sheet Metal Workers Int'l Ass'n, 753 F.2d 1172, 1185-86 (2d. Cir. 1985). The Division, however, relying on its reading of Stotts, has asked the United States District Court for the Western District of New York--a court bound by the authority of the Second Circuit--to modify a decree under which the City of Buffalo, New York, uses goals and timetables in the hiring and promotion of minorities and women. United States v. City of Buffalo, Civil Action Nos. CIV-73-414, CIV-79-195 (W.D.N.Y). The decree at issue was entered several years ago, in an action brought by the Civil Rights Division, after the Division proved discrimination. In a brief recently filed in Buffalo, the Division has acknowledged that binding precedent--the rule of law--precludes its motion. Nevertheless, the Division has proceeded with its motion. See Reply Memorandum of the United States, Jan. 31, 1985, at 1-2, United States v. City of Buffalo.

Another example of the Division's disregard for its legal obligations appears in litigation involving the City of Birmingham, Alabama. Even before the decision in Stotts, the Civil Rights Division joined in a lawsuit brought by white male employees of the City of Birmingham to challenge race-conscious promotions undertaken pursuant to a consent decree negotiated principally by the Civil Rights Division. The decree was signed and entered in mid-1981, after the present Administration took office. By the terms of that decree, the Government was specifically bound to defend its remedial provisions in the event of any challenge by nonparties.

In joining the white plaintiffs in Birmingham, the Civil Rights Division has disregarded its contractual and court-ordered obligation to defend the decree. The Division has taken the position that it is not attacking the validity of the Birmingham consent decree but merely disputing its interpretation--according to Mr. Reynolds's present view, the decree does not provide for race-conscious relief at all. Mr. Reynolds, however, has acknowledged that the Birmingham decree, as written, signed and ordered, does "not fully conform to the equal employment policies" of the administration. 17/ Accordingly, the Judge presiding over the Birmingham litigation found that "the United States has advanced arguments that appear to be contrary to its obligations under the Decree . . . ." In re Birmingham Reverse

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17/ Letter of William B. Reynolds to Rep. Albert L. Smith, Jr., June 16, 1982.

Discrimination Employment Litigation, 37 Fair Empl. Prac. Cas. (BNA) 1, 8 (N.D. Ala. Feb. 19, 1985). Although the court "permitt[ed] the United States to align itself with the white male plaintiffs, it "insist[ed] that the United States act in accord with its obligations under the Decree[]". Id.

Quite apart from the Civil Rights Division's indifference to law in the area of remedies for employment discrimination, its positions in cases reflect a striking substantive inconsistency, reflecting, again, a failure of vigorous enforcement against discrimination. In briefs filed throughout the country, Division attorneys, under the leadership of Mr. Reynolds, have argued strenuously that the employment discrimination laws protect only "individual" rights. See, e.g., Reply Memorandum of the United States, Jan. 31, 1985, at 14, United States v. City of Buffalo, Civil Action Nos. CIV-73-414, CIV-79-195 (W.D.N.Y.); Supplemental Brief of the United States, Jan. 19, 1985, at 13, Paradise v. Department of Public Safety, No. 84-7053 (11th Cir.). On the other hand, in Connecticut v. Teal, 457 U.S. 440 (1982), for example, the Administration urged that regardless of the discriminatory impact of a job test on an individual employee, the employer should not be found guilty of discrimination if, despite the harm to the individual minority member resulting from the test, the employer had hired a significant number of other minority employees. This position hardly reflects a consistent concern for individual as opposed to group rights.

The policies and practices of the Civil Rights Division under Mr. Reynolds show an indifference to its obligation to enforce the employment discrimination law as laid down by the courts. It is the duty of the nation's law enforcement officers to obey that law, and not to abrogate it unilaterally at the expense of the people whose rights they are mandated by law and oath of office to enforce.

VOTING

Protection of minority voting rights is central to any civil rights program. Yet Mr. Reynolds has opposed the strengthening of statutory protections for minority voting rights, urging Congress to provide remedies only in cases of proved specific discriminatory intent, and has undermined the rule of law by failing to enforce statutory voting rights protections both administratively and in litigation.

The attitude underlying Mr. Reynolds's conduct is exemplified by the manner in which he dealt with Congressional efforts to eliminate continuing barriers to political participation by minorities. When Congress assessed renewal of the Voting Rights Act in 1982, Mr. Reynolds vigorously opposed providing any remedy to plaintiffs who had not met the extremely difficult burden of proving specific discriminatory intent. Voting Rights Act, Hearings on S.53, S.1761, S.1975, S.1992 and H.R. 3112, Before the Subcommittee on the Constitution of the Senate Committee on the Judiciary, 97th Cong.2d Sess., 1655-1850 (1982).

In renewing the Act, Congress rejected the Administration's position. Consonant with the Act's remedial purposes, Congress directed that liability should turn not on fortuitous matters such as the availability of proof of specific intent but on consideration of a wide range of circumstances known to be probative of barriers to equal political participation. At the same time, Congress expressly disclaimed establishment of any right to "proportional representation", or "guaranteed" electoral victory for specific groups.

Despite this action by Congress, for one and one-half years after the 1982 Amendments to the Voting Rights Act were passed, Mr. Reynolds failed to file any new lawsuits to enforce Section 2 of the Act, which prohibits any voting laws which have discriminatory "results". Moreover, having failed to persuade Congress of the merits of his views, Mr. Reynolds recently approved the filing of a Justice Department brief in the United States Supreme Court, arguing that the Court should severely limit the protections of Section 2 for minority voters. In Thornburg v. Gingles, No. 83-1968, the Justice Department has dramatically departed from its traditional stance of aligning itself with minority voters in voting rights cases and has sided with a state covered by the Voting Rights Act--North Carolina--and against minority voters, to argue that District Court findings of racial discrimination should be reversed. In Gingles, the District Court invalidated six multimember legislative districts and one single-member state Senate district on detailed findings that they diluted black voting strength. The Justice Department in its brief contends that the District Court equated a Section 2 violation with guaranteed electoral success of black candidates--a standard the District Court expressly disavowed.

In defending its civil rights record in this area, the Department of Justice relies heavily on statistics showing a number of objections to voting law changes under Section 5 of the Voting Rights Act. Section 5 requires Federal preclearance of all voting law changes in nine states and parts of 13 others. Under the law, the Assistant Attorney General for civil rights must object if the voting law change is racially discriminatory in either purpose or effect.

The Department's statistics should not be permitted to mask the numerous instances in which Mr.

Reynolds has abdicated his responsibility to enforce Section 5 and placed his imprimatur on voting law changes found discriminatory by the courts. Last year Mr. Reynolds lodged an objection to a change in the method of appointment of members of the Greene County, Alabama, Racing Commission because the change appeared to prevent the appointment of blacks. Four months later, after protests from Alabama State officials, this objection was withdrawn for the asserted reason that the Justice Department lacked jurisdiction to disapprove the change. Mr. Reynolds's position was challenged in court, and a three-judge court ruled that he was wrong, enjoining the change until it had been properly reviewed by the Department of Justice. Hardy v. Wallace, 603 F. Supp. 174 (N.D. Ala. 1985).

In 1982 Mr. Reynolds approved a new congressional redistricting plan for Louisiana over the objections of black legislators from that state and of his own staff. Mr. Reynolds approved the new plan even though Louisiana Governor David Treen had threatened to veto an earlier legislatively enacted plan because it contained a majority black congressional district. The plan approved by Mr. Reynolds split up black precincts in central New Orleans between two grossly contorted districts, thus denying black voters a majority in any district; it had been devised at a secret meeting from which black legislators were excluded.

Major v. Treen, 574 F. Supp. 325, 334 (E.D. La. 1983). After Mr. Reynolds approved the plan, a three-judge District Court unanimously ruled that the plan denied minority voting rights in violation of Section 2 of the Voting Rights Act. Id.

Mr. Reynolds approved a North Carolina State legislative reapportionment plan containing districts that diluted black voting strength by at-large, multi-county voting and by fracturing black population concentrations to deny black voters voting majorities. Subsequently, a three-judge District Court struck down the districts Mr. Reynolds had approved. Gingles v. Edmisten, 590 F. Supp. 345 (E.D.N.C. 1984), prob. juris. noted, 53 U.S.L.W. 3776 (U.S. April 29, 1985).

Mr. Reynolds approved a Montgomery, Alabama, city redistricting plan even though it reduced the number of majority-black districts and even though his own staff concluded that the plan was intentionally discriminatory. In a private suit brought after Mr. Reynolds approved the plan, a District Court ruled that the plan was racially discriminatory in both purpose and effect. Buskey v. Oliver, 565 F. Supp. 1473 (M.D. Ala. 1983). Mr. Reynolds also rejected objections from local citizens and approved new redistricting plans for Scott County, Mississippi, and Petersburg, Virginia, which diluted black voting strength.

Private lawsuits were filed challenging these plans, and the local jurisdictions that devised them subsequently revised them to meet the objections of the private litigants.

Mr. Reynolds's failure to perform his enforcement responsibilities under Section 5 of the Voting Rights Act has enormous implications. The Voting Rights Act places the primary responsibility to enforce Section 5 on the Department of Justice. There is no appeal from the Department's withdrawal of a Section 5 objection or from the failure to object to a discriminatory voting law change (although a private lawsuit may be brought challenging the change on constitutional or statutory grounds). When the Assistant Attorney General, who has the final decision on these matters, fails to perform his statutory duty, it undermines the Voting Rights Act's statutory scheme for the protection of minority voting rights and causes minority voters to lose confidence that the Justice Department can be counted on to protect their rights.

Mr. Reynolds also has failed in significant instances to enforce constitutional and statutory minority voting rights through litigation. In 1983, after Mr. Reynolds's highly publicized tour of Mississippi, Voting Section attorneys proposed filing eleven new lawsuits in Mississippi to enforce Section 5 objections to new county redistricting plans and to obtain new, nondiscriminatory plans for the upcoming county elections. Pleadings had been prepared and were on Mr. Reynolds's desk for his signature. Nevertheless, Mr. Reynolds refused to approve the filing of ten of these proposed new lawsuits, and only one new Mississippi lawsuit was filed, involving justice of the peace districts in sparsely populated Lawrence County (pop. 12,000). N.Y. Times, Oct. 17, 1983, at A8. Two amicus curiae briefs were filed in private lawsuits in two other counties, opposing the relief sought by the private litigants.

In the recent Chicago, Illinois, city redistricting case, the Justice Department joined with private plaintiffs in challenging a city redistricting plan that reduced the number of majority-black wards and diluted Hispanic voting strength. The District Court struck down the challenged plan but approved a new plan that minority voters contended failed to grant them a complete remedy. The private plaintiffs appealed, but Mr. Reynolds refused to permit Voting Section attorneys to join in their appeal. Last year the United States Court of Appeals for the Seventh Circuit reversed the District Court's approval of the new plan and sent the case back to the District Court for a more complete remedy. Ketchum v. Byrne, 740 F.2d 1398 (7th Cir. 1984), petition for cert. filed, 53 U.S.L.W. 3343 (U.S. Oct. 18, 1984).

The Justice Department also refused to file an appeal from an adverse District Court decision in a lawsuit to enforce a Section 5 objection to a change to at-large elections for the Sumter County, South Carolina, County Commission. When the District Court ruled against the Department's position, private plaintiffs appealed, but Mr. Reynolds refused to authorize an appeal by the Department. The Supreme Court summarily and unanimously reversed the District Court's decision. Blanding v. DuBose, 454 U.S. 393 (1982).

Mr. Reynolds also refused to authorize the filing of a Justice Department brief in Rogers v. Lodge, 458 U.S. 613 (1982), one of the most important voting rights cases to reach the Supreme Court since City of Mobile v. Bolden, 446 U.S. 55 (1980) (holding that the Fourteenth Amendment requires proof of discriminatory purpose in voting cases). When the case was in the Fifth Circuit, the Justice Department filed a lengthy amicus curiae brief in support of the minority voter plaintiffs. The Fifth Circuit ruled that at-large elections in Burke County, Georgia, had been maintained for a discriminatory purpose in violation of the Fourteenth Amendment on the basis of circumstantial evidence of discriminatory intent. When the defendants appealed to the Supreme Court, Mr. Reynolds did an about-face and refused to approve a Justice Department brief supporting the

Fifth Circuit's decision. Nevertheless, the Supreme Court, by a vote of 6 to 3, affirmed the Fifth Circuit's ruling.

In the voting rights area, Mr. Reynolds, in abdication of his responsibilities, has taken actions that undermine the vigorous enforcement of voting rights guarantees. In a democracy, no right is more vital than the right to vote. Failure to enforce our country's voting rights guarantees not only undermines the rule of law but strikes at the foundations of our system of government. The Justice Department's resistance to legislative proposals designed to strengthen voting rights protections and its failings in this area of enforcement during Mr. Reynolds's tenure weaken the fundamental basis of our system of government.

CONCLUSION

The record of the Civil Rights Division under William Bradford Reynolds is a record of resistance to enforcement of constitutional and statutory rights of minorities. It is a record characterized by frequent derogation of legal obligations. It is not the record of a person who merits advancement to a position two steps from the highest law enforcement office in the land.

It is the business of the Department of Justice and its senior officials to lead the nation in its never-ending quest for social justice, a quest that requires amelioration of the effects of prior discrimination, 18/ elimination of present discrimination, and prevention of future discrimination. For the last four years, that responsibility has rested particularly with Mr. Reynolds. We believe that he has defaulted on his responsibility and has thus demonstrated that he is not qualified to give the leadership demanded of a senior Department of Justice official. Accordingly, his nomination should not be approved.

18/ Louisiana v. United States, 380 U.S. 145, 154 (1965); Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975); Swann, 402 U.S. at 16; Green v. City School Bd. of New Kent County, 391 U.S. at 437-38.

Appendix A

Albert E. Arent
Thomas I. Atkins
Martha Barnett
Thomas D. Barr
St. John Barrett
G. d'Andelot Belin
Brooksley Born
Wiley A. Branton
Jack E. Brown
Cecil E. Burney
Goler Teal Butcher
Robert Carswell
J. LeVonne Chambers
Benjamin R. Civiletti
Ramsey Clark
Peter J. Connell
Jerome A. Cooper
Lloyd N. Cutler
James T. Danaher
Drew S. Days, III
Armand Derfner
Sara-Ann Determan
Adrian W. DeWind
Paul R. Dimond
John W. Douglas
Fred N. Fishman
Owen M. Fiss
Macdonald Flinn
Jefferson B. Fordham
Laurence S. Fordham
John P. Frank
John D. French
Lloyd K. Garrison
A. Spencer Gilbert, III
Joan Hall
Herbert J. Hansell
Conrad K. Harper
B. Boyd Hight, Jr.
Claude H. Hogan
Jerome E. Hyman
Hugh R. Jones
John B. Jones, Jr.
Edward E. Kallgren
Robert H. Kapp
Maximilian W. Kempner
Stuart J. Land
Robert M. Landis
George N. Lindsay
Sanford M. Litvack
Hans F. Loeser
Edward A. McDermott
Jane McGrew
Ronald S. Miller
Robert F. Mullen
Robert A. Murphy
James M. Nabrit, III
Frederick M. Nicholas
Sheldon Oliensis
Stephen J. Pollak
Charles Quaintance, Jr.
Harriet S. Rabb
Norman Redlich
Allan H. Reuben
James Robertson
Mitchell Rogovin
Charles Runyon
Lowell E. Sachnoff
David M. Satz, Jr.
John H. Schafer
Jerome G. Shapiro
Jerome J. Shestack
Arthur D. Shores
Chesterfield Smith
McNeill Smith
Asa D. Sokolow
Nicholas U. Sommerfeld
David S. Tatel
John E. Tobin
Marna S. Tucker
Herbert M. Wachtell
Bethuel M. Webster
Francis M. Wheat
Roger Wilkins
Karen Hastie Williams
Robert B. Wolf
Edward A. Rothschild

APPENDIX B

LAWYERS' COMMITTEE
FOR CIVIL RIGHTS UNDER LAW
SUITE 400 • 1400 EYE STREET, NORTHWEST • WASHINGTON, D.C. 20005 • PHONE (202) 371-1212
CABLE ADDRESS: LAWCIV WASHINGTON, D.C.

TESTIMONY OF

ROBERT H. KAPP
CO-CHAIRMAN
LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW

before the

Committee on Education and Labor

and the

Committee on the Judiciary

U.S. House of Representatives
99th Congress
1st Session

March 27, 1985

Chairman Hawkins, Chairman Rodino, and Members of the Committees:

I am Robert H. Kapp, of Washington, D.C., Co-Chair of the Lawyers' Committee for Civil Rights Under Law. I am pleased to appear before you today on behalf of the Lawyers' Committee in support of H.R. 700, the "Civil Rights Restoration Act of 1985." We urge both Committees of the House to report out this measure favorably and promptly following the conclusion of these hearings so that this essential legislation can be enacted as quickly as possible. It is tragic that in 1984, although H.R. 5490 (a similar measure) passed the House overwhelmingly, the short time available at the close of the last Session prevented its adoption in the Senate.

Enactment of this measure is necessary to close gaps in civil rights enforcement that were created by the Supreme Court's Grove City ruling.[1] Because of that decision, which we think misconstrued the intent of the earlier Congresses which passed Title VI of the 1964 Civil Rights Act, Title IX of the Education Amendments of 1972, Section 504 of the Rehabilitation Act of 1973, and the Age Discrimination Act of 1975, many individuals have been left without adequate protection or redress should they be subjected to invidious discrimination by institutions or agencies which receive millions or billions of dollars in federal funding. By passing H.R. 700, this Congress will be restoring a mechanism to provide relief should such discrimination occur.

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[1] Grove City College v. Bell, 79 L. Ed. 2d 516 (1984).

Taking this action does not signify, as some have suggested, that our nation has not made substantial strides over the last generation in eradicating the corrosive effects of bias and prejudice. Significant gains have occurred, as demonstrated by the increasing numbers of racial and ethnic minority persons, women, senior citizens and the disabled who can now participate in "mainstream" economic, political, educational and other institutions in our society. Our satisfaction with the progress which has been achieved, however, should not cause us to ignore the reality that discrimination can and does still occur. Contemporary administrative and judicial determinations bear witness to the fact that it is still far too early in our struggle against discrimination to put away the tools which have helped us to get this far.

Restoring the administrative and judicial processes to remedy discrimination by enacting H.R. 700 also should not cause us to lessen our efforts to improve the efficacy and fairness with which our civil rights laws are enforced. Under each of the statutes affected by this measure, recipients of federal assistance are not presumed to discriminate and are guaranteed due process through extensive procedural and appeal rights in the administrative process.[2] These rights should be respected, and we are confident that the Congress will continue to exercise its oversight responsibilities to insure that this happens. Similarly, we support strategies to minimize the possibility that recipients will be subjected to different standards and overlapping jurisdiction. The exercise of coordinating responsibility by a lead Department or agency, which, for example, the Justice Department carries out for Title VI and the Department of Health & Human Services provides for the Age Discrimination Act, helps to insure consistency of substantive approach by federal agencies; and inter-Department delegation or referral agreements speed the process of investigations and avoid duplication. Such techniques should continue to be explored and are, of course, unaffected by H.R. 700.[3]

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[2] *See* 130 Cong. Rec. H 6800 (daily ed., June 25, 1984)(remarks of Rep. Bartlett).

Finally, we cannot agree with Assistant Attorney General Reynolds that the bill will work some kind of enormous, intrusive expansion of federal regulatory authority into private affairs. The statutes in question do not give federal agencies the power to regulate, at will, in the economic, academic, or any other spheres of private decisionmaking. They are painfully simple.

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[3] We agree fully with the comments of Rep. Bartlett on this subject:

> Receipt of Federal financial assistance brings with it the obligation to complete assurance forms, to submit to monitoring by Federal agencies, and to answer charges of discrimination. This obligation may be construed as a burden. However, it is a burden which can be relieved by streamlining of administrative policies which affect recipient burdens associated with assurance forms, monitoring visits, and discrimination charges. Such streamlining suggests procedural rather than substantive modification in the implementation of civil rights protections, and poses an issue not affected by [H.R. 700].

130 Cong. Rec. H 6809 (daily ed., June 25, 1984).

They require only that where federal dollars flow, there be no discrimination based on race, sex, national origin, age or handicapping condition.

It is indeed ironic that Mr. Reynolds has referred to the bill as creating "federal supervision, regulation, intervention, intrusion and oversight . . . [o]nerous administrative reporting requirements, disruptive agency compliance reviews, and massive bureaucratic paperwork . . . ." We do not think that is an accurate description of past, much less current, federal enforcement efforts, which have led to the progress to which I have referred. In any event, as an officer of the United States, it is up to Mr. Reynolds, and to his counterparts in other Departments, to manage their staffs in such a way as to avoid the unnecessary disruption and intrusion which he claims to fear. We have no doubt that this can be done. The minimal burdens occasioned by a properly functioning antidiscrimination enforcement system should be willingly shouldered by the citizens of a free society which is dedicated to the realization of equal opportunity.

The remainder of my testimony today will cover a few major areas about the bill. I will describe the pressing need for the legislation in light of the Supreme Court's Grove City College decision. I will speak to the issues of breadth of coverage of educational institutions and other entities under Title IX and the other statutes. Finally, I would like to comment on some of the concerns which have been raised about this legislation.

The Lawyers' Committee

I would like to start by providing a brief description of the Lawyers' Committee and its involvement with the questions that are before you.

The Lawyers' Committee for Civil Rights Under Law was established at the request of the President of the United States. On June 21, 1963, John F. Kennedy met with several hundred leading American lawyers whom he had invited to the White House in the wake of violent reactions to civil rights demonstrations in Alabama and Mississippi. Expressing dismay at the lack of respect for the commands of the Constitution as interpreted by the American judicial system, both the President and the Attorney General urged the Bar to play a more active role in assuring that racial progress could be made consistent with the Rule of Law. The Lawyers' Committee was formed in response to this plea, and it has since that time made important contributions through peaceful and legal means toward the realization of equal opportunities for all Americans.

As Lloyd Cutler, former Counsel to the President and one of my distinguished predecessors as Co-Chair, said of the Committee on a similar occasion nearly thirteen years ago, "our principal activity is to take part in the trial and appeal of cases that raise significant issues relating to the rights of minority and other disadvantaged groups."[4] Initially, the Lawyers' Committee sponsored volunteer attorneys who travelled to Mississippi in the summers of 1963 and 1964 to advise and represent individuals involved in non-violent civil rights demonstrations. In 1965, we opened a full-time-staffed office in Jackson to deal with the continuing and serious legal difficulties of minority citizens in that state. In 1968, following disorders in many northern cities, the Committee established local offices in fourteen cities from Boston to Los Angeles to stimulate and coordinate the involvement of attorneys from the private bar in civil rights litigation at the local level. Many of these offices have evolved into separately incorporated, locally funded, nonprofit organizations.

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[4] School Busing: Hearings Before Subcommittee No. 5 of the House Comm. on the Judiciary, 92d Cong., 2d Sess. 1178, 1179 (1972).

For well over a decade now, the Lawyers' Committee also has operated, in its national office in Washington, projects focusing on specific substantive areas of the law that are of particular concern to minorities and the disadvantaged. The attorneys working on these projects have developed a high degree of expertise, and have played important roles in the development of legal principles, in such domains as education, employment discrimination, voting rights, and the provision of governmental services to predominantly minority neighborhoods.

The Committee has had a longstanding and especial concern about federal administrative enforcement of civil rights laws. In the 1970's, for example, it issued comprehensive studies of discrimination in federally supervised state employment services, and in state and local law enforcement agencies receiving funding under the Omnibus Crime Control and Safe Streets Act. The Committee, along with other organizations, pressed the Attorney General to issue coordinating regulations for all Executive Departments under Title VI of the Civil Rights Act of 1964. (Regulations outlining the minimum content of enforcement programs were issued in 1976.)[5] The Committee provided counsel to black police officers who brought suit in 1975 to enjoin the Law Enforcement Assistance Administration to carry out its civil rights enforcement responsibilities.[6] Its staff has frequently testified in oversight hearings regarding the Equal Employment Opportunity Commission and the Office of Federal Contract Compliance Programs. From 1976 to 1984, its Federal Education Project focused substantial attention on civil rights enforcement in education, by the Department of Health, Education & Welfare, and then by the Department of Education.

The Lawyers' Committee thus is intimately familiar with how federal antidiscrimination law was construed, and how the administrative enforcement process functioned, prior to the *Grove City* decision. Indeed, the Committee recognized that the position advanced by Grove City College would seriously impair, if not destroy, the efficacy of Title IX of the Education Amendments of 1972 and would have grave consequences for the scope of other antidiscrimination measures, including Title VI of the 1964 Civil Rights

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[5] *See* 28 C.F.R. §§ 42.401 *et seq.*

[6] *See* *National Black Police Association v. Velde*, 631 F.2d 784 (D.C. Cir. 1980), *vacated and remanded*, 458 U.S. 591 (1982), *on remand*, 712 F.2d 569 (D.C. Cir. 1983), *cert. denied*, 80 L. Ed. 2d 562 (1984).

Act. For this reason, we submitted a brief amicus curiae in the Supreme Court, arguing that students' use of Basic Educational Opportunity Grant (BEOG) funds to pay tuition and expenses made Grove City College a "recipient" of "Federal financial assistance" and thus subject to the requirements of Title IX; and further, that Title IX prohibited discrimination in any part of Grove City's institutional activities. While the Court's majority agreed with our first contention, it adopted -- erroneously, in our view -- an exceedingly narrow view of what Title IX and other federal anti-discrimination laws require, which has made necessary the measure which your Committees are considering.

The Grove City Ruling

The question before the Supreme Court in the Grove City case was whether the fact that the college's students financed their educations in part through BEOG Grants[7] made the school a recipient of Federal financial aid subject to the nondiscrimination requirements of Title IX. On this issue, we think the Court properly took a realistic view:

> The structure of the Education Amendments of 1972, in which Congress both created the BEOG program and imposed Title IX's nondiscrimination requirement, strongly suggests [coverage]. . . . In view of this connection and Congress' express recognition of discrimination in the administration of student financial aid programs, it would indeed be anomalous to discover that one of the primary components of Congress' comprehensive "package of federal

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[7] These grants are now known as "Pell grants."

> aid," . . . was not intended to trigger coverage under Title IX.[8]

In further support of its conclusion, the majority opinion noted, inter alia, that Congress was well aware in 1972 "that the student assistance programs established by the amendments would significantly aid colleges and universities";[9] that BEOGs were easily distinguishable from "food stamps, Social Security benefits, welfare payments, and other forms of general-purpose governmental assistance to low-income families" because (a) Congress did not "inten[d] the receipt of federal money in this manner to trigger coverage under Title IX," (b) "these general assistance programs, unlike student aid programs, were not designed to assist colleges and universities," (c) the schools may have no knowledge and certainly have no control over whether they receive such general assistance monies whereas their willing participation -- which they may withhold -- is necessary if their students are to receive BEOG grants, and (d) "individuals' eligibility for general assistance is not tied to attendance at an educational institution"[10]; and that Title IX was closely patterned upon Title VI, whose "drafters . . . envisioned that the receipt of student aid funds would trigger coverage."[11] Finally, the Court observed that its conclusions were strongly supported by post-enactment legislative developments, including both the failure of the Congress to disapprove Title IX regulations defining coverage broadly and its rejection of proposed amendments which would have limited coverage to institutions which "directly" receive federal aid.[12]

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[8] 79 L. Ed. 2d at 525-26 (citations & footnote omitted).

[9] Id. at 527 & n.14 (footnote omitted).

[10] Id. at 527 n.13.

[11] Id. & n.15.

Unfortunately, these same indicators of Congressional intent were ignored by the Court's majority when it considered the second issue which it felt it necessary to decide in the case: the scope of Title IX's prohibition against discrimination by a college or university receiving federal funds. In holding that Title IX merely requires that Grove City College not discriminate in its administration of student financial aid programs, the majority reached a result which we think would astonish the Congresses which enacted Title VI and Title IX every bit as much as a decision that Grove City's receipt of BEOG funds did not subject it to Title IX coverage at all! For the effect of the Court's narrow reading of the words "program or activity" in Section 901 is that a school whose students receive BEOG grants may subject women to any and all kinds of unequal treatment based upon their sex except that if it admits them as students, it may not discriminate against them in the award of financial aid. This result trivializes the great purposes of Title IX and other federal antidiscrimination laws.

The drafters of Title IX understood that the student aid programs which they fashioned in the Education Amendments of 1972 would assist institutions, and not just students; although the Supreme Court relied upon this fact in holding that Grove City College was subject to Title IX, the Court ignored it in determining the scope of coverage. When the principal sponsor of Title IX, Senator Bayh, was asked whether the language, "any program or activity," would reach "dormitory facilities . . . athletic facilities . . . or . . . just educational requirements," he responded that "[w]hat we are trying to do is provide equal access for women and men students to the educational process and the extra-curricular activities in a school . . . ."[13]

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[12] Id. at 528-29 & nn.18, 19.

Moreover, the post-enactment history of Title IX is equally significant with respect to how broadly the statute prohibits discriminatory conduct by educational entities. As amended by successive Congresses, Title IX includes, in Section 901(a), a series of specific exclusions from coverage. Many of these exemptions relate to events or functions which are very unlikely ever to receive earmarked federal support; for example, social fraternities or sororities, and beauty pageant scholarships. Unless Congress contemplated that the scope of Section 901 would be institution-wide, there would be no reason to have enacted these exclusions.[14] Further, in 1974, the Congress had directed the Secretary of Health, Education and Welfare to

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[13] 117 Cong. Rec. 30407 (1971)(emphasis added).

[14] See Haffer v. Temple University, 524 F. Supp. 531, 541 (E.D. Pa.), aff'd, 688 F.2d 14 (3d Cir. 1982).

> publish, not later than 30 days after the date of enactment of [P.L. 93-380], proposed regulations implementing the provisions of title IX of the Education Amendments of 1972 relating to the prohibition of sex discrimination in federally assisted education programs *which shall include with respect to intercollegiate athletic activities reasonable provisions considering the nature of particular sports*.[15]

To the best of our knowledge, no federal funds have ever been appropriated to support intercollegiate athletics. Thus, the Supreme Court's interpretation in *Grove City*, that the Secretary lacked power to issue regulations in this area unless intercollegiate athletic programs at a school receive direct federal support, flies in the face of the obvious intentions of the Congresses which enacted and fine tuned Title IX. Finally, successive Congresses also *defeated* proposals to amend the statutory language so as to exclude from Title IX coverage similar, non-federally funded activities, such as "revenue producing" intercollegiate athletics,[16] any programs not receiving direct federal aid,[17] or programs other than those required for graduation.[18] Senator Bayh successfully opposed these amendments on the ground that they would have exempted "areas of traditional discrimination against women that are the reason for the . . . enactment of Title IX [including] . . . scholarship

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[15] Pub. L. No. 93-380, § 844, 88 Stat. 484, 612, *reprinted* in 1974 U.S. Code Cong. & Ad. News 541, 695 (emphasis added).

[16] *See* 120 Cong. Rec. 15322 (1974) (amendment proposed by Sen. Tower).

[17] *See* 121 Cong. Rec. 23845 (1975) (amendment proposed by Sen. Helms).

[18] *See* 122 Cong. Rec. 28136 (1976) (amendment proposed by Sen. McClure).

. . . employment . . . and extra-curriculum [*sic*] activities such as athletics."[19]

Federal agency regulations under Title VI, Title IX, Section 504 or the Age Discrimination Act never articulated the narrow theory of coverage adopted by the Supreme Court. In fact, Grove City College's argument was that there was *no* "program or activity" at the school which could be said to receive federal support, and prior to the time the case reached the Supreme Court, the government never advanced the contention that the only such "program or activity" was the financial aid office.[20] Although the exact language of regulations varied from one agency to another, and although regulations were, of necessity, framed in general terms, in their enforcement activities federal Departments consistently took a broad approach.[21] This broad reading of the statutes was not seriously disputed until recently.[22]

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[19] 122 Cong. Rec. at 28144.

[20] Prior to the current administration, the Department of Justice had consistently favored a broad interpretation of coverage different from its position in *Grove City*. *See*, *e.g.*, letter from Special Assistant to the Attorney General for Title VI to the General Counsel, Veterans' Administration, March 5, 1968, at 2, *quoted in* U.S. Commission on Civil Rights, *Federal Civil Rights Enforcement Effort* (1971) 186:

> However, under the assistance provisions encompassed by the veterans educational aid statutes payment, although directly made to the beneficiary, is expressly conditioned upon his pursuit of an approved educational institution. . . . Thus, payments are specifically tied to the beneficiary's participation in an educational program or activity, which is thereby assisted through the availability of federal funds.

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[21] For one example, shortly after Title VI was passed, the Department of Health, Education & Welfare undertook a nationwide compliance effort with respect to hospitals. Guidelines for hospitals and nursing home facilities issued in 1964 and reissued in 1969 by the Department required the elimination of discriminatory practices throughout all the operations of a recipient, without seeking to trace federal funds.

[22] *See, e.g.*, *Bossier Parish School Board v. Lemon*, 370 F.2d 847 (5th Cir.), *cert. denied*, 388 U.S. 911 (1967); *United States v. Jefferson County Board of Education*, 372 F.2d 836 (1966), *aff'd en banc*, 380 F.2d 385 (5th Cir.), *cert. denied sub nom. Caddo Parish School Board v. United States*, 389 U.S. 840 (1967). In *Board of Public Instruction v. Finch*, 414 F.2d 1068 (5th Cir. 1969), the Court viewed Title VI as authorizing termination of less than all federal funds going to a school system still operating on a segregated basis, suggesting that funds for supplementary education centers might not be within the phrase "program or activity" in section 602. Two aspects of the case are important to bear in mind. *First*, the Fifth Circuit did not suggest that section 601 was so limited. Indeed, Senator Case had emphasized, when the 1964 Civil Rights Act was debated, that "the words and provisions of section 601 and the substantive rights established and stated in that section are not limited by the limiting words of section 602." 110 Cong. Rec. 5254 (1964). *Second*, because the Court of Appeals also recognized that even the supplemental facilities' operations could well be infected by the pervasive discriminatory environment within the school system, *Taylor County* had no drastic practical impact on the agency.

In the late 1970's HEW's regulatory authority under Title IX was challenged, with respect to coverage of employment practices, on the basis of a "program or activity" theory. *E.g.*, *Romeo Community Schools v. HEW*, 600 F.2d 581, 584 (6th Cir.), *cert. denied*, 444 U.S. 972 (1979). However, these decisions were disapproved by the Supreme Court in *North Haven Board of Education v. Bell*, 456 U.S. 512 (1982). Contrary to the testimony of Assistant Attorney General Reynolds, the Supreme Court in *North Haven* did *not* "hol[d] that the coverage and fund termination provisions of Title IX are coterminous." Instead, the Court merely recognized that there were program-specific limitations in each section -- without deciding the content of those limitations in either place: "We conclude, then, that an agency's authority under Title IX both to promulgate regulations and to terminate funds is subject to the program-specific limitation of §§ 901 and 902." *Id.* at 538. "So read, the regulations conform with the limitations Congress enacted

[footnote continued on next page]

The Impact of the Grove City Ruling

If the Court's Grove City decision were merely a ruling in a private controversy with no systemic consequences, the Lawyers' Committee would not be appearing before you to urge legislative correction. However, the effect of the decision is to narrow drastically the protections against invidious discrimination which are available to racial and ethnic minority citizens, to women, to the disabled, and to the aged -- and to limit those protections not just in the educational arena, but throughout the range of institutions and activities in contemporary America which are affected by federal grant and other assistance programs. Since Grove City was decided, federal agencies have closed or modified pending enforcement proceedings in light of the narrow Grove City interpretation of federal antidiscrimination law, leaving the victims of discrimination without protection. The Department of Education alone has closed, suspended or refused to proceed in more than 60 cases involving allegations of race, sex and handicap discrimination in federally supported institutions where it had not been established that the federal assistance is traceable to the particular component of the institution in which the discrimination was alleged to have occurred.

[footnote continued from previous page]

in §§ 901 and 902. . . . [W]e do not undertake to define 'program' in this opinion." Id. at 539, 540. See also the remarks of Senator Case, quoted in the preceding paragraph.

I am sure that your Committees have been presented with documentation of this process, but it is worth repeating the description of some of the events here because they graphically demonstrate the effects of the Supreme Court's ruling.

-- The Office for Civil Rights (OCR) in the Department of Education received a complaint that a proprietary beauticians' training school, enrolling students who received federal grants or loans, assigned Black students to Black clients only, gave Black students but not white students janitorial duties, etc. After Grove City, the case was closed without investigation for lack of jurisdiction. It is difficult to imagine a case involving allegations of discriminatory practices more typical of those which Congress sought to reach through Title VI.

-- Little more than a week after the Supreme Court announced its decision, the Department of Education discontinued enforcement efforts to eliminate sex discrimination in a major state university's intercollegiate athletics program. OCR had made initial determinations of probable discrimination but the case was dropped after Grove City despite Congress' 1974 explicit direction to the agency to regulate in the area of intercollegiate sports. Since that time, the Department of Education has dropped a number of other cases involving allegations of sex discrimination in intercollegiate athletic programs.

-- OCR decided it could not investigate a complaint that a correctional officer had been fired because of his disability, since the former officer had not been employed in education programs funded under the Education of All Handicapped Children Act or the Vocational Education Act at the correctional facility.

-- OCR is delaying an investigation into an employment discrimination complaint by an instructor at a large technology institute while it tries to determine whether any of the federal funds (totalling almost $ 250,000 in 1983 and 1984) received by the school went to the department in which the complainant worked.

-- An Administrative Law Judge has ruled that Title IX does not prohibit sex-segregated physical education classes unless a school district receives federal funds that are earmarked for physical education instruction, a result totally at odds with the expectations expressed by Senator Bayh and others when Title IX was enacted.

These are typical examples of how the administrative remedy against discrimination which Congress sought to fashion in Title VI, Title IX, Section 504 and the Age Discrimination Act is being diluted and destroyed. The efforts of already overburdened enforcement personnel have been diverted to the task of mapping the path of Federal financial assistance. Instead of providing what President Kennedy described in 1963 as "[s]imple justice" -- an accessible mechanism to insure "that public funds, to which all taxpayers of all races contribute, not be spent in any fashion which encourages, subsidizes, or results in racial discrimination,"[23] federal antidiscrimination laws have been distorted by the *Grove City* decision into complex and ineffective schemes that dash hopes for equality of opportunity. The administrative remedies crafted by the Congress now are, at best, burdened heavily by the necessity of tracing federal dollars[24] within institutions, school systems, or other entities, or at worst, rendered irrelevant.[25] Indeed, it would appear that under the Court's approach in *Grove City*, the Veterans' Administration would be required to make tuition grants to otherwise eligible white veterans choosing to attend a school which excludes Blacks, since that discrimination would occur within the school's Admissions Office and not its financial aid program.[26]

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[23] Message to Congress of June 19, 1963, 109 Cong. Rec. 10552 (1963), *reprinted in* 1963 U.S. Code Cong. & Ad. News 1526, 1534; *see also* 110 Cong. Rec. 6543 (1964)(Sen. Hubert H. Humphrey).

[24] *See* 130 Cong. Rec. H 7018 (daily ed., June 26, 1984)(Rep. Perkins, quoting letter from Congressional Budget Office: "To monitor adherence to nondiscrimination policies under current law [in light of *Grove City*], the federal, state, and local governments would have to increase their administrative efforts and accounting capabilities to trace the flow of Federal financial assistance to individual programs and activities").

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[25] In his memorandum to the Secretary of Education recommending that *University of Richmond v. Bell*, 543 F. Supp. 321 (E.D. Va. 1982), be appealed, [then Acting] Assistant Secretary for Civil Rights Harry M. Singleton said:

> If universally accepted, the opinion would (1) halt all protection against discrimination in curricular and extracurricular athletics at all educational levels; (2) nullify all civil rights responsibilities deriving from the broadest forms of aid to education (including, it would appear, impact aid to school districts as well as campus-based student aid in colleges and universities); (3) allow recipients to insulate pockets of discrimination by the way they structure their applications for assistance; (4) preclude OCR from adequately investigating discrimination in a student aid office where the student aid office is acting on the instructions of the athletic department; (5) preclude investigations in other cases where discrimination originating in one part of a school causes discrimination in another part; (6) preclude OCR even from gathering information about the structure and funding pattern of a recipient; and (7) require OCR to be ready to make a factual presentation to a court before it makes initial contact with a recipient.

Memorandum from Harry M. Singleton to The Secretary, August 19, 1982, at 2. Assistant Attorney General W. Bradford Reynolds rejected the request to appeal the ruling.

Grove City's impact on non-educational entities is similar to that described by Assistant Secretary Singleton. *See*, *e.g.*, *United States v. Baylor University Medical Center*, 736 F.2d 1039, 1049-50 (5th Cir. 1984)(investigation of discrimination in emergency room and in-patient care was appropriately "program-specific" where hospital received Medicare and Medicaid reimbursements for emergency and in-patient services). The reasoning in the *Baylor* opinion suggests that a medical facility could structure its services in such a fashion as to insulate some discriminatory practices from scrutiny even though the institution as a whole may be heavily dependent upon federal grant and reimbursement programs for its fiscal health.

But the effects of the *Grove City* ruling extend far beyond the administrative process. The artificial conception of Title IX's ban on sex discrimination which the Court announced will also restrict the remedies available to victims of discrimination who bring court actions under the statute, which were recognized in the *Cannon* case.[27] Thus, for example, a lawsuit challenging inequalities in intercollegiate athletic opportunities available to male and female students at a public university[28] would, after *Grove City*, have to be dismissed unless it could be demonstrated that federal funds were used in the athletic program of the school.[29] These twin effects: crippling of administrative enforcement of federal antidiscrimination laws and the severe curtailment of private suits under those laws, warrant Congressional intervention to restore the broad protections against discriminatory conduct by recipients of federal funding which was intended to be provided by Title IX.

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[26] *See* *Stewart v. New York University*, 430 F. Supp. 1305, 1314 (S.D.N.Y. 1976); *compare* *Bob Jones University v. Johnson*, 396 F. Supp. 597 (D.S.C. 1974), *aff'd* 529 F.2d 514 (4th Cir. 1975). We must note with dismay that the U.S. Civil Rights Commission recently called for legislation which would overrule the first part of the Supreme Court's *Grove City* ruling so that "a college which deliberately foregoes federal aid to avoid federal edicts should not be federalized [*sic*] as a result of enrolling students who have themselves received federal student aid." March 5, 1985 Commission Statement on Grove City, at 6. Under this approach, Bob Jones University, which is ineligible for federal tax-exempt status because of racially discriminatory policies, would receive BEOG or VA funds.

[27] *Cannon v. University of Chicago*, 441 U.S. 677 (1979). *See also* *Consolidated Rail Corporation v. Darrone*, 79 L. Ed. 2d 568, 574 n.7 (1984).

[28] *See* *Haffer v. Temple University*, 524 F. Supp. 531 (E.D. Pa. 1982).

[29] *See* *id.* at 540 (alternative holding).

As I have described, however, the damage wrought by the Grove City ruling is not limited to Title IX. The Supreme Court recognized that Title IX was patterned after Title VI, and it discussed the legislative history of both statutes in its opinion, as did the dissent,[30] suggesting that at least these two laws will be similarly construed. Furthermore, in a companion case -- involving a non-educational institution -- the Court intimated that the Grove City analysis would govern interpretation of the phrase "program or activity" which appears in Section 504 of the Rehabilitation Act.[31] Thus, while the Court has not yet had occasion to spell out explicitly the full implications of its Grove City approach to the interpretation of federal antidiscrimination law, it has made it quite clear that the effects of Grove City will be felt beyond education and beyond Title IX.

As I have indicated, the Department of Education has already begun to close or defer investigations not only involving claims of sex discrimination prohibited by Title IX, but also those raising claims of discrimination on the basis of handicap in violation of Section 504, or racial discrimination contrary to Title VI. Similarly, it would appear that after *Grove City*, suits on behalf of students claiming that their participation in extracurricular activities was curtailed,[32] or by teachers averring that they were discharged,[33] because of their handicaps could not be maintained absent a demonstration that federal funds subsidized the extracurricular programs or the teaching slot in question. Cases involving claims of ethnic discrimination in a non-federally funded college program operated by a Department and institution receiving substantial Federal financial assistance[34] would likewise be barred.

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[30] See 79 L. Ed. 2d at 516 & n.15 (majority opinion); id. at 538-48 (dissenting opinion).

[31] Consolidated Rail Corporation v. Darrone, 79 L. Ed. 2d 568, 578 (1984).

Indeed, *Grove City* creates doubt even about the Supreme Court's previous ruling that public school students who are unable to understand the language of instruction may obtain redress from a federal court. For in its 1974 ruling in *Lau v. Nichols*,[35] the Court made no reference to any finding that the Chinese-speaking plaintiffs in that case had been denied admittance to a special "program or activity" supported with federal funds. The uses to which federal monies were put were not identified by the Supreme

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[32] *See* *Wright v. Columbia University*, 520 F. Supp. 789 (E.D. Pa. 1981); *Poole v. South Plainfield Board of Education*, 490 F. Supp. 948 (D.N.J. 1980).

[33] *See* *Pittsburgh Federation of Teachers v. Langer*, 546 F. Supp. 434 (W.D. Pa. 1982); *see also* 130 Cong. Rec. H 6804 (daily ed., June 25, 1984)(remarks of Rep. Murphy).

[34] *See* *Yakin v. University of Illinois*, 508 F. Supp. 848, 850 (N.D. Ill. 1981).

[35] 414 U.S. 563 (1974).

Court, which observed only that the San Francisco Unified School District "receive[d] large amounts of federal financial assistance."[38] The Court held that English-only classes denied the Title VI rights of the plaintiffs by limiting their access to the *overall educational program* of the school system, in language very different from that used in the *Grove City* decision.[39]

In all of these cases, there will be no adjudication, no fact-finding. Suits will be foreclosed whether or not the allegations are true, in spite of the fact that in each instance the alleged discriminatory practices are directly contrary to well-established national policy embodied in federal legislation, and that the Congress has repeatedly sought to accomplish their elimination. By closing off the administrative and judicial processes to valid charges, *Grove City* thus directly impedes the realization of the national goal of equal opportunity.

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[38] *Id.*

[39] The court concluded:

> It seems obvious that the Chinese-speaking minority receives fewer benefits than the English-speaking majority *from respondents' school system* which denies them a meaningful opportunity to participate in *the educational program* -- all earmarks of the discrimination banned by the regulations.

Id. at 568 (emphasis added & footnote omitted). *See also id.* at 570 (Stewart, J., concurring in the result) (quoting HEW interpretive guideline requiring a school system receiving federal funds to insure "effective participation in *the educational program* offered by a school district" by taking "affirmative steps to . . . open *its instructional program*" to non-English speakers (emphasis added)).

It would appear, after *Grove City*, that this analysis is insufficient and that Title VI would require only that specific program offerings supported by federal funds be made accessible to limited-English-speaking children without discrimination. *Cf.* 130 Cong. Rec. H 6804-05 (daily ed., June 25, 1984)(remarks of Rep. Murphy)(handicapped students).

For the reasons I have given, the Lawyers' Committee cannot agree with those who have suggested that remedial legislation in response to the ruling should be limited only to Title IX or only to educational institutions. A bill so limited would fail to neutralize all of the disturbing effects of *Grove City*, and it would promise years of additional litigation over the precise scope of coverage while discriminatory practices go unremedied.

Broad, Institution-Wide Coverage is Necessary

The Lawyers' Committee also submits that the requirement of nondiscrimination on the basis of race, national origin, sex, handicap or age should apply broadly to institutions or entities which are recipients of Federal financial assistance -- as would be provided by H.R. 700. Narrow definitions of coverage, whether they utilize the approach of the *Grove City* majority or that of the administration's bill (with respect to educational institutions) unavoidably place a governmental *imprimatur* upon continued discrimination by limiting the obligation to eliminate it which is tied to the receipt of federal assistance. Since there is no disagreement about the goal of eradicating such discrimination, there is no adequate justification for compelling federal enforcement agencies to expend enormous resources in order to determine whether or not a claim that discrimination has been practiced by an admitted recipient of federal assistance can be investigated and redressed.

We urge your Committees to reject alternatives to H.R. 700 which do not provide for broad coverage and enforcement. First, we condemn the suggestion of the Civil Rights Commission[40] that the Congress should seek to overrule Grove City's holding that BEOG's and other forms of indirect aid which are provided to institutions[41] are "Federal financial assistance" within the meaning of these laws. As I have previously observed, Congress contemplated, when it enacted the BEOG statute, that institutions of higher learning would benefit from the grants, which are explicitly tied to the institutions' charges for their educational offerings to students.[42] Indeed, today such forms of assistance probably constitute the predominant means of federal support for higher education.[43] In light of this fact, limiting the reach of the

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[40] See supra note 28.

[41] Grove City, of course, involved an educational institution. The same principles apply, however, to non-educational entities. See, e.g., United States v. Baylor University Medical Center, supra note 27 (holding Medicare and Medicaid payments are "Federal financial assistance" within the meaning of Section 504).

[42] See 20 U.S.C. §§ 1070(a), 1070(a)(1)(B). See also H.R. Rep. No. 2157, 85th Cong., 2d Sess. (1958), reprinted in 1958 U.S. Cong. & Ad. News 4731, 4738 (federal contributions to student loan funds established and administered by colleges but not commingled with schools' general revenues would nevertheless "materially assist institutions of higher education to retain their more competent students who need financial assistance in order to continue their studies").

[43] Cf. H.R. Rep. No. 92-554, 92d Cong., 1st Sess. (1971), reprinted in 1972 U.S. Code Cong. & Ad. News 2462, 2584 (Supplemental

[footnote continued on next page]

laws covered by H.R. 700 only to schools which seek other forms of federal assistance would amount to a declaration that the Congress is indifferent to the occurrence of discrimination against students to whom it has made available BEOG aid. This would indeed be a sorry civics lesson for the youth of our country.

We believe that the administration's approach, which Mr. Reynolds endorsed when he testified before you on March 7, is wholly inadequate, even as to its treatment of educational institutions. There can be no reasoned justification for varying the extent of protection against invidious discrimination among colleges or university systems which receive federal aid, based upon their internal administrative structures.[44] Certainly the benefits of federal assistance are not so confined. Budgets are constructed and implemented on an integrated, school- or system-wide basis. While declining enrollments may sometimes lead to a reduction or termi-

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[footnote continued from previous page]

views) ("Federal dollars now constitute over 20% of the total budget of our higher education system. Most of these dollars flow to institutions through research contracts, student assistance programs, and categorical programs . . .").

[44] The measure supported by Mr. Reynolds defines the term "program or activity," as applied to educational institutions, to "mean the educational institution." Only Title IX contains a definition of the latter term, but it is a restrictive one which Mr. Reynolds recommends:

> . . . in the case of an educational institution composed of more than one school, college or department which are administratively separate units, such term means each such school, college or department.

20 U.S.C. § 1681(c).

nation of certain course offerings, no college, university system or other corporate entity of which we are aware rigidly compartmentalizes its fiscal processes according to its academic or functional structure. For example, the operation of some schools or departments may be sources of net revenue for the institution or system of institutions. When these schools or departments receive federal aid, whether through research grants or BEOG awards to students who are enrolled in them, federal funds contribute directly to the overall financial soundness of the institution or system. For this reason alone, the obligation to avoid discrimination must extend to all parts of the entity.[45]

Objections to the Legislation

I would like to close my remarks by referring briefly to some of the objections to this legislation which have been raised.

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[45] As one court recently noted,

> Title VI binds the service provider, or "recipient," thus it affords a remedy against discrimination by recipients to all participants in a federally funded program,[9] not merely to the individual beneficiaries of the federal aid[10] -- since eligibility for a specific type of aid is determined by criteria unrelated to the discrimination Congress sought to prevent.
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> [9] Title VI requires that "the public bodies or private entities receiving the benefits of any such loan refrain from racial discrimination." 110 Cong. Rec. 6545 (1964) (comments of Sen. Humphrey).

(emphasis in original; footnote 10 omitted.)

I have already adverted to Mr. Reynolds' description of the measure as increasing federal government intrusion into private affairs. It is difficult to credit this assertion. H.R. 700 does not alter the statutory language, "recipient of Federal financial assistance," nor prescribe any changes in existing regulatory or judicial definitions of that term. It merely provides a definition of the "program[s] or activit[ies]" of such "recipients" as to which invidious discrimination is prohibited. To the extent, therefore, that a small grocery store accepting food stamps would be a "recipient of Federal financial assistance" within the meaning of Title VI, Title IX, Section 504 or the Age Discrimination Act, which we do not believe to be the case, that result flows from statutory language unaffected by H.R. 700 and from pre-Grove City interpretations of the law which are not changed either by that decision or by the bill.[46]

For the same reason, nothing in this bill would alter the current regulatory provisions which exclude the ultimate beneficiaries of assistance from the definitions of "recipient." We think Mr. Reynolds is plain wrong in his concerns about farmers who receive federal price supports. Nothing in H.R. 700 affects the criteria or language by which federal agencies have determined that price support payments to a farmer are not "Federal financial assistance" within the meaning of Title VI, Title IX, Section 504 or the Age Discrimination Act.[47]

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[46] We note that Justice White took pains in the Court's opinion in Grove City to distinguish student financial assistance from, inter alia, Food Stamps. See 79 L. Ed. 2d at 527 n.13. Of course, that discussion is dictum but it does indicate the direction of the Court's thinking.

As to Mr. Reynolds' talismanic invocation of the concept of a "limited federal government role" and his references to state and private responsibilities, it is important to note that the statutes amended by H.R. 700 are concerned only with the prohibition of discriminatory conduct, an area which has been recognized as a particularly proper federal concern since passage of the Thirteenth and Fourteenth Amendments.[48]

A great deal of discussion has occurred, both last year and this year, about whether or not H.R. 5490 or H.R. 700 may be properly characterized as "restoring the pre-Grove City construction" of the four antidiscrimination laws which the bill would affect. Earlier in my testimony, I sketched briefly the broad interpretation of coverage under these laws which was common among federal agencies and courts until quite recently. On this basis, we believe that H.R. 700 does in fact seek to restore the general approach which prevailed before the Grove City ruling. While opponents have pointed to a handful of lower federal court rulings in the past several years which anticipated Grove City's narrow approach to the construction of the term "program or activity," as an indication that this legislation goes beyond a restoration of the *status quo ante*, we would suggest that the predominating agency interpretations and judicial rulings prior to 1984 were in favor of wide, not narrow, coverage. But even if we thought that in some respects the bill which you are considering went beyond established pre-Grove City law, we would still support its enactment because of the overriding importance of affording all persons adequate protections against invidious discrimination.[49]

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[47] As the court noted in Bob Jones University v. Johnson, 396 F. Supp. 597, 601 n.15 (D.S.C. 1974), aff'd, 529 F.2d 514 (4th Cir. 1975):

> A "recipient" within the meaning of Title VI is not to be confused with the "beneficiary" of federal assistance. The recipient is the intermediary entity whose nondiscriminatory participation in the federally assisted program is essential to the provision of benefits to the identified class which the federal statute is designed to serve. . . . The requirements of Title VI cover recipients but not beneficiaries.

[48] See, e.g., Jones v. Alfred H. Mayer Co., 392 U.S. 409, 437-44 (1968).

During last year's consideration of H.R. 5490, Senator Hatch asserted that passage of the legislation would impose affirmative action obligations upon thousands of American businesses, agencies and individuals. That was not true of H.R. 5490 and it is not true of H.R. 700 this year. No agency regulations under either Title VI, Title IX, Section 504 or the Age Discrimination Act, so far as we have been able to ascertain, require affirmative action of any recipient, although voluntary affirmative action by recipients is not proscribed. Recipients are mandated to take actions which consciously consider race, sex, national origin, handicap status or age only when necessary to remedy discrimination which has been found through appropriate agency investigative and adjudicatory procedures (subject to ultimate judicial review).

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[49] As Representative Ford put it last year:

> I do not quarrel with the accuracy of the [Grove City] decision. The court had a judgement to exercise. It is a matter of "Monday morning quarterbacking" the intentions of the legislators who put the law together in the first place. What is essential now is that we have the language that expresses precisely what we mean and that firmly keeps in place enforcement procedures which have worked so well nailed down so that we do not leave open the possibility of future arguments before the Court that could lead to interpretations similar to Grove City College.

130 Cong. Rec. H 6817 (daily ed., June 24, 1985)(emphasis added).

Some questions have also been raised about the impact of this measure upon organizations which receive no federal grants and do not benefit from federal student assistance, but which do have federal tax-exempt status under Section 501(c)(3) of the Internal Revenue Code. The short answer to these inquiries is that tax exemption will not subject an organization or entity to the requirements of Title VI, Title IX, Section 504 or the Age Discrimination Act. Tax exemption has been specifically rejected as a basis for triggering coverage under these statutes,[50] and with a single, isolated exception, no court has ever suggested otherwise. The absence of any precedential basis for treating tax-exempt status as "Federal financial assistance" under these statutes was fully discussed by the Lawyers' Committee last year in response to a request from Representative Edwards, and a copy of that correspondence is attached to this testimony.

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[50] Bachman v. American Society of Clinical Pathologists, 577 F. Supp. 1257, 1263 (D.N.J. 1983).

Finally, as lawyers, we were surprised by Assistant Attorney General Reynolds' suggestion that H.R. 700 could somehow be construed to extend Title IX's prohibition of sex discrimination beyond "educational" programs or activities. Since the word "education" will remain in the statute, immediately preceding and modifying the newly defined term "program or activity," we see no defensible basis whatsoever for reading the "proposed new language . . . as deleting the modifier 'education,'" as Mr. Reynolds testified might be the case.

Conclusion

The Lawyers' Committee strongly urges passage of this important legislation without delay. I will be happy to respond to any questions from Members of the Committees.

APPENDIX C

LAWYERS COMMITTEE
FOR CIVIL RIGHTS UNDER LAW

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BEFORE THE SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL
RIGHTS OF THE HOUSE COMMITTEE ON THE JUDICIARY
April 16, 1985

STATEMENT OF THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW ON THE FY 1986 AUTHORIZATION REQUEST FOR THE CIVIL RIGHTS DIVISION OF THE U.S. DEPARTMENT OF JUSTICE

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STATEMENT OF THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW ON THE FY 1986 AUTHORIZATION REQUEST FOR THE CIVIL RIGHTS DIVISION OF THE U.S. DEPARTMENT OF JUSTICE

By

William L. Robinson[1]

and

Richard T. Seymour[2]

Mr. Chairman and Members of the Subcommittee:

Thank you for the opportunity to testify before you on the authorization of funds for the Civil Rights Division of the U.S. Department of Justice.

Introduction

The Lawyers' Committee is a nationwide civil rights organization, with local offices in Washington, Philadelphia, Boston, Chicago, Jackson, Denver, Los Angeles, and San Francisco. It was formed by the leaders of the American Bar in 1963, at the request of President Kennedy, to provide legal representation to blacks who were being deprived of their civil rights. Over the years, the national office of the Lawyers' Committee and its local offices have represented the interests of blacks, Hispanics, and women in hundreds of class actions in the fields of employment discrimination, voting rights, equalization of municipal services, and school desegregation. Well over a thousand members of the private bar, including former Attorneys General, former presidents of the American Bar Association, and other leading lawyers, have assisted us in these efforts.

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As the fact of these hearings demonstrates, this is an unusual point in the history of the Civil Rights Division. For most of the period of time since its creation in the Civil Rights Act of 1957, 71 Stat. 634, the Division has been a faithful and effective champion of the interests of members of minority groups and of women in being free from unlawful discrimination. Under its present leadership, however, it is beginning to turn away from its statutory purposes. Ignoring real problems of discrimination left untouched in its own cases, it is devoting itself to cutting back the limited relief already provided in those cases. Ignoring the plight of black applicants for Firefighter positions in the District of Columbia, some of whom have had to wait for three years to be hired as the result of a hiring test even the Justice Department acknowledges to be biased, it has chosen instead to attack an affirmative action plan which in its hiring provisions merely reduced the adverse impact of the admittedly unlawful test. Ignoring the practical problems in identifying individual victims in cases in which there has been wholesale classwide discrimination over many years, it has chosen instead to press the theory that only those persons individually proven to be victims of discrimination are entitled to race-conscious or gender-conscious relief. Seizing on an enormously overbroad reading of the Supreme Court's decision in Firefighters Local Union No. 1784 v. Stotts, 81 L.Ed.2d 483 (1984), it is seeking to re-open at least 51 consent decrees and litigated decrees it has obtained in cases against State and local government agencies.

We respectfully submit to this Subcommittee that the degree of the Civil Rights Division's turn away from its statutory responsibilities, and the degree of its scarce resources which are being wasted in quixotic attacks on well-accepted principles of relief, warrant the exercise of the power of Congress to redirect the Division to a proper discharge of its duties. We urge this Subcommittee to consider the passage of a rider to the authorization bill, and to any continuing resolution, which would bar the Division from squandering its resources in the effort---which we submit is a vain effort---to persuade the courts that all race-conscious and gender-conscious affirmative action not limited to proven victims of discrimination is unlawful.[3]

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[3] If the Civil Rights Division were merely seeking to eliminate goals and timetables in cases in which they were no longer necessary as a practical matter, or were challenging only such race- and gender-conscious relief which it thought unreasonable under the particular facts of the case at bar, we would not be urging the passage of such a rider. Such an effort would be in keeping with settled principles of law, and would in itself be unremarkable. What now faces Congress is completely different: the rigid insistence that race- and gender-conscious relief is always unlawful, in all situations, no matter how pervasive and deep the discrimination such relief is designed to cure, no matter how inadequate alternative forms of relief may be, and no matter how many courts reject this extreme view.

We do not wish to repeat the other statements which are being provided to this Subcommittee, and will accordingly limit ourselves to four main points: First, the traditional forms of affirmative-action relief which the Civil Rights Division wishes to abolish have proven to be both fair and effective in actual practice, and the Division has nothing as fair and effective with which to replace them. Second, the Civil Rights Division's emphasis on identifying individual victims of discrimination will in many cases mean that no meaningful relief can be provided for past and present race and sex discrimination, no matter how much harm such discrimination has done. Third, the Civil Rights Division has concentrated so much of its resources on an effort to advance the cause of white males that it has ignored its real responsibilities. Fourth, the manner in which the Civil Rights Division has chosen to carry out its attacks on affirmative action will place needless burdens on the district courts.

In fairness to the present leadership of the Civil Rights Division, however, we must also point out that they have not joined the call of the Chairman of the Equal Employment Opportunity Commission for massive and unwarranted changes in the interpretation of Title VII's basic definitions of discrimination. The Civil Rights Division continues to use and be guided by the Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. §§ 1607.1 et seq.; the holdings of Griggs v. Duke Power Co., 401 U.S. 424 (1971); the principles allowing large-scale problems of discrimination to be attacked through cases alleging systemic discrimination; and similar standards.[4] The problems with the Civil Rights Division to which we point today are the problems of misallocation of resources and of its efforts to limit the remedies available where discrimination has been proven. As serious as are the problems to which we point today, they would be far more grave if the Division were to join with the Chairman of the EEOC on these other questions as well.

A. Race- and Gender-Conscious Relief is Fair and Effective

When the Justice Department's Consent Decree with the City of Miami was entered in 1977, blacks and Hispanics constituted only 38% of the City's own workforce; today they constitute 61% of the City's workforce. The Miami Police Department was 25.6% black and Hispanic in 1977, and 56% minority in June 1984.

In January 1981, two months after the Justice Department's decree with the Los Angeles police force was entered, blacks and Hispanics were 18% of the police force. Two weeks ago, they were 25% of the police force.

When the Justice Department sued the Philadelphia police force for refusing to allow women to become police officers, there were no women officers. Today, there are 450---more than 6% of the force.

On June 30, 1979, three months after the Justice

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[4] See the December 14, 1984 testimony of the Lawyers' Committee in the oversight hearings concerning the EEOC held by the Subcommittee on Employment Opportunities of the House Committee on Education and Labor. A copy is being provided to this Subcommittee.

Department's decree with the San Francisco Police Department was entered, 14% of the police force were members of minority groups. As of a month ago, that figure had climbed to 26%.

When the Justice Department filed its lawsuit against the City of Buffalo, less than 3% of the police force was black. Today, that figure has risen to 9.6%.

This experience is in line with the Lawyers' Committee's experiences in its own cases. In Morrow v. Crisler, 491 F.2d 1053 (5th Cir.)(en banc), cert. den., 419 U.S. 895 (1974), the court of appeals reversed the district court's denial of goals and timetables for hiring blacks by the Mississippi Highway Patrol. As the en banc court noted, when the case was heard by the original panel in June 1972, the Highway Patrol had only four black patrolmen. By October 1973, there were only two more blacks. The glacial speed of this "progress" persuaded the en banc court that the imposition of hiring goals was necessary if the number of blacks on the Patrol were to be increased. 491 F.2d at 1055. There are now 62 black Troopers and Inspectors out of 399---15.5% of the total.

In Arnold v. Ballard, C.A. No. C 73-478 (N.D.Ohio), the Lawyers' Committee filed suit against the Akron Police and Fire Divisions. When the suit was filed on May 11, 1973, the Akron Fire Department had not yet hired its first black firefighter. On May 14, 1973, the district court restrained the Fire Division from going ahead with its plans to hire eight white firefighters. 6 FEP Cases 285 (N.D.Ohio, 1973). On June 20, 1973, the district court ordered that one black firefighter be hired for each white firefighter hired. 6 FEP Cases 287 (N.D. Ohio, 1973). The ratio was subsequently lowered by Consent Decree to one black hire for every three hires. There are now 59 black firefighters, out of a total of 362. Thus, the percentage of firefighters who are black has gone from 0% to 16.3%.

The Police Division had only 15 blacks, out of a total of 493 officers, in May 1973. This was only 3% of the force. (Finding 6, 390 F.Supp. 723, 726 (N.D.Ohio, 1975)). As of May 9, 1974, there were only 14 black officers out of a total of 524, for a representation of 2.7%. (Id., finding 8, after excluding civilian employees). The court ordered that the Department hire one black officer out of every three hires. 390 F.Supp. at 736. There are currently 73 black police officers and cadets, out of a total of 494. Thus, the percentage of police officers and trainees who were black has gone from 2.7% at the time of trial to 14.8%.

The present leadership of the Civil Rights Division wants to eliminate such progress. Each of the Justice Department cases described above is on the Division's "hit list"; in each, the Division has written to counsel for the defendant, suggesting a drastic reduction in relief, eliminating all race- and gender-conscious affirmative action which could benefit persons who have not individually been proven to be victims of discrimination. We submit that there is no practical reason for this effort, and that none can be found in considerations of "merit".[5] Not only are goals and timetables effective in remedying longstanding patterns of exclusion of minorities and women from various types of jobs, the persons selected under the goals and timetables are usually considered by their employers to be at least as capable as those selected under traditional civil service paper-and-pencil tests[6] or traditional subjective interviewing techniques. The City of Philadelphia tells us it has found that its female police officers selected under the goals and timetables are every bit as capable as its male police officers. The City of Miami tells us that it is getting people under the goals and timetables of its decree who are very bit as qualified as those selected under the old system. The April 15, 1985 issue of U.S. News & World Report quotes the Chairman of the Milwaukee Police and Fire Commission as saying "Our goals and quotas have worked quite well."

If cities, counties, and States thought that they were getting lower-quality employees under the goals and timetables in their decrees, one would expect that every defendant in a Justice Department suit would leap at the chance to be relieved of such affirmative-action obligations. But this is not the case.

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[5] See Judge Clark's observation below at p. 13.

[6] Even in situations in which there is a professionally developed test, the ability of the test to predict who will be a successful performer is quite poor. Of all the things which go to make up the actual variability in performance from person to person, test scores typically predict less than 10% and leave more than 90% of the applicants' variability in performance totally unexplained.

Miami, Philadelphia, the New York Highway Patrol, Boston, Chicago, Los Angeles, Fort Lauderdale, and Jackson, Mississippi have announced their opposition. U.S. News & World Report states that, when the list of local governments involved by the Justice Department's decision to try to eliminate goals and timetables was made known, "it became evident that most of them were balking." It quoted the Omaha police chief as asking, "Why stir up the mud?"

B. The Justice Department Has No Effective Replacement for Goals and Timetables as a Remedy

In each of the cases in which the Justice Department is seeking the elimination of hiring goals and timetables, it is proposing that the employer instead be bound by a commitment to recruit applicants so that the applicant flow has the same proportions of blacks, Hispanics, and women as there are in the local labor force. The employer is then required to make the commitment that it will not discriminate on the basis of race or sex against those who apply. The problems with this approach are that it is unfair to both the employer and the groups formerly discriminated against.

As to the employer, the use of goals and timetables gives the employer a "bright line" for measuring its own compliance. If it fails to meet the goals, it knows that it has to take a hard look at what happened and see if there is a justification for it, such as the lack of suitably qualified minority or female applicants. The use of a "bright line" is fair and workable to the employer, because the "bright line" occurs in an area---hiring---the employer has the power to control. The Justice Department's suggested replacement still has a "bright line" of compliance, but it is in the area of applications, which the employer has no power to control. A last-minute surge of white male applicants may leave an employer in jeopardy of sanctions although it had no effective power over the number of applicants from each race and sex group.

As to the groups excluded by past discrimination, it mismatches the discrimination found and the remedy offered. They were denied jobs, not applications, and jobs rather than applications would seem the appropriate remedy. Moreover, when it comes to the hiring decision itself, the Civil Rights Division's proposed relief is relatively meaningless. The employer was commanded by the statute not to discriminate in hiring. It disobeyed the statutory command, and it is curious to think that it will somehow obey the identical command merely because it has been repeated by a court. It is even more curious to contemplate the relief to be ordered if the employer then were to violate the judicial command not to discriminate. Under the Civil Rights Division's approach, the employer would be given the same command again, could violate the same command again, and would never face the prospect of goals and timetables no matter how often the district court parroted the original statutory command not to discriminate.

C. Without Race- or Gender-Conscious Relief, In Some Cases There Will Be No Effective Relief

In some cases, race- and gender-conscious relief is the *only* effective remedy for past racial or sexual discrimination. A telling example is provided by two cases arising in the Middle District of Alabama, *NAACP v. Allen* and *United States v. Frazer*. *Allen* was a private action brought to challenge the exclusion of blacks from employment in the Alabama Department of Public Safety. *Frazer* was an action brought by the Attorney General to challenge racial discrimination against blacks in the employment of persons engaged in the administration of Federally financed grant-in-aid programs in several Alabama agencies.

On July 28, 1970, the district court decided *Frazer*, finding widespread discrimination against blacks in recruitment, hiring, job assignments, promotions, and the maintenance of racially segregated restrooms and other facilities for employees. Each of the discriminatory practices found at trial was expressly enjoined, and the defendants were ordered to recruit at predominantly-black schools and other places and to refrain from future discrimination. While the defendants were ordered to hire 30 specific black applicants found to have been discriminated against, no racial quota for permanent employees was ordered. 317 F.Supp. 1079, 1090-93 (M.D. Ala., 1970).

Allen was decided on February 10, 1972. The tenor of the facts is best captured by the following excerpt:

> Plaintiffs have shown without contradiction that defendants have engaged in a blatant and continuous pattern and practice of discrimination

> in hiring in the Alabama Department of Public Safety, both as to troopers and supporting personnel. In the thirty-seven year history of the patrol there has never been a black trooper and the only Negroes ever employed by the department have been nonmerit system laborers.

340 F.Supp. 703, 705 (M.D. Ala., 1972). The court ordered quota relief in the following three paragraphs:

> III. It is further ordered that the defendants be and they are each hereby enjoined from failing to hire and permanently employ after the probationary period, one Negro trooper for each white trooper hired until approximately twenty-five (25) percent of the Alabama state trooper force is comprised of Negroes. This injunction applies to the cadet and auxiliary troopers as well as to the regular troopers. It shall be the responsibility of the Department of Public Safety and the Personnel Department to find and hire the necessary qualified black troopers.
>
> IV. It is further ordered that the defendants be and they are hereby enjoined from conducting any training courses for the purpose of training new troopers until the groups to be given said training courses are comprised of approximately twenty-five (25) percent black trooper candidates.
>
> V. It is further ordered that the defendants be and they are each hereby permanently enjoined from failing to hire supporting personnel for the Department of Public Safety in the ratio of one Negro for each white until approximately twenty-five (25) percent of the supporting personnel are black. The decree in United States v. Frazer, 317 F.Supp. 1079 (M.D.Ala. 1970) is hereby amended insofar as the Department of Public Safety's employment practices are concerned.

340 F.Supp. at 706.

The defendants appealed from the entry of the quota relief against them, and on other issues. The district court denied their motion for a stay of the decree pending appeal. On November 12, 1973, the Fifth Circuit ordered that the record in the case be supplemented, and that the district court be provided with an opportunity to reconsider its decree in the light of current information. 7 FEP Cases 128. This was done, and the district court entered a new opinion on January 5, 1974, under the name United States v. Dothard, 373 F.Supp. 504 (M.D.Ala., 1974). Comparing progress under the Allen decree imposing quotas on the Department of Public Safety and the Frazer decree simply enjoining discrimination at a number of Alabama agencies, the district court stated:

> On February 10, 1972, the date this Court's order and injunction was entered in this case, the State of Alabama employed no black state troopers. Since the entry of this order, the state has hired forty-nine (49) troopers, of whom twenty-five (25) have been black. Sixteen (16) of the black troopers are still working for the Department of Public Safety. The progress in the area of support personnel has been even more significant. Today there are some eighty (80) blacks working in support positions in the Alabama Department of Public Safety where before this Court entered its order February 10, 1972, there were none. This Court considers it appropriate in this case to compare the progress achieved thus far in this case under the February 10, 1972, order with the limited success of the decree entered in United States v. Frazer, 317 F.Supp. 1079 (M.D.Ala., 1970). So that the panel of the Fifth Circuit may also be able to compare the progress in Frazer, the motion of the United States to supplement the record herein with the evidence filed on July 19, 1973, in the Frazer case will be granted. Like Allen, Frazer represented an attack on the discriminatory employment practices of State of Alabama agencies. In both cases the agencies in question hired most of their employees through the Alabama Personnel Department, and the head of Personnel, Frazer, is a defendant in both cases.
>
> * * *
>
> The Frazer decree has a much wider scope than

> the *Allen* order, which focuses on only one agency -- the Alabama Department of Public Safety -- but the decree in *Frazer* lacks the precision achieved in *Allen* through the use of hiring goals. The contrast in results achieved to this point in the *Allen* case and the *Frazer* case under the two orders entered in those cases is striking indeed. Even though the agencies affected by the Frazer order and the Department of Public Safety draw upon the same pool of black applicants -- that is, those who have been processed through the Department of Personnel -- *Allen* has seen a substantial black hiring, while the progress under *Frazer* has been slow and, in many instances, nonexistent. ... Today the Alabama Department of Public Safety has nearly one hundred (100) blacks employed in nonmenial jobs in both trooper and support positions. With its eighty (80) black support personnel, the Alabama Department of Public Safety has nearly as many black clerical employees as all seventy-five (75) other Alabama state agencies combined!
>
> Thus in a racial discrimination in employment type case, when the parties are entitled to relief by reason of the fact that their constitutional rights have been violated, this Court's experience reflects that the decrees that are entered must contain hiring goals; otherwise effective relief will not be achieved.

373 F.Supp. at 505-07 (footnote omitted).

The case then went back to the court of appeals. Judge Charles Clark, writing for a unanimous court, analyzed "the constitutional problems raised by affirmative hiring relief", *NAACP v. Allen*, 493 F.2d 614, 618 (5th Cir., 1974). Citing *Louisiana v. United States*, 380 U.S. 145, 154 (1965), and other decisions of the Supreme Court, Judge Clark began by noting that, where racial discrimination has been shown, "the federal chancellor has 'not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future'", that the court's equitable powers are flexible, and that the flexibility should be exercised so as to fulfill the requirement that a decree "must be feasible, workable, effective, ... and promise realistically to work and to work now."

Judge Clark then took issue with the argument that it is a derogation of "merit" principles to use a quota to remedy the harm done to blacks by use of "unvalidated selection procedures that have been shown to disqualify blacks at a disproportionate rate":

> ...[B]y definition such criteria have not been shown to be predictive of successful job performance. Hence, there is no reliable way to know that any accepted applicant is truly better qualified than others who have been rejected. Until the selection procedures used by the defendants here have been properly validated, it is illogical to argue that quota hiring produces unconstitutional "reverse" discrimination, or a lowering of employment standards, or the appointment of less or unqualified persons.
>
> The Constitution is not an actionable, written guarantee to any minority class that it will receive proportionate representation in public employment. Rather, that "color blind" document underwrites only the ideal: an equal opportunity of access to employment in public agencies whose hiring practices are based solely on merit. No individual possesses a constitutional right to public employment, and it is not the purpose of quota relief to require that anyone who lacks job-related qualifications be employed. However, the "color conscious" relief which we affirm does require that the defendants temporarily institute race as the final determinative factor in their appointment of applicants to fill new openings on the patrol and its supporting staff. ...
>
> * * *
>
> In the absence of an invidious purpose, a determination of unconstitutionality here would be

> clearly unwarranted. Even assuming for the purposes of argument, that action of a state official taken pursuant to a compulsory federal judicial order constitutes state action, the affirmative hiring relief instituted *sub judice* fails to transgress either the letter or the spirit of the Fourteenth Amendment. Presuming further, that the federal chancellor's discretion should be subjected to the stringent compelling governmental interest test, the decree passes constitutional muster. No one is denied any right conferred by the Constitution. It is the collective interest, governmental as well as social, in effectively ending unconstitutional racial discrimination, that justifies temporary, carefully circumscribed resort to racial criteria, whenever the chancellor determines that it represents the only rational, nonarbitrary means of eradicating past evils.

493 F.2d at 618, 619. Judge Clark then cited numerous decisions of the Supreme Court and of the other courts of appeals imposing race-conscious relief in order to provide a remedy for past discrimination and end ongoing discrimination, agreed with the district court that "quota relief was essential to make meaningful progress" in the case before it, 493 F.2d at 620-21, and summarized his review of the constitutional questions posed by such relief:

> In conclusion we would note that this extraordinary remedy is not without its limitations. The use of quota relief in employment discrimination cases is bottomed on the chancellor's duty to eradicate the continuing effects of past unlawful practices. By mandating the hiring of those who have been the object of discrimination, quota relief promptly operates to change the outward and visible signs of yesterday's racial distinctions and thus, to provide an impetus to the process of dismantling the barriers, psychological or otherwise, erected by past practices. It is a temporary remedy that seeks to spend itself as promptly as it can by creating a climate in which objective, neutral employment criteria can successfully operate to select public employ-

> ees solely on the basis of job-related merit. For once an environment where merit can prevail exists, equality of access satisfies the demand of the Constitution.

D. The Difficulty in Identifying Individual Victims of Discrimination

NAACP v. Allen is also an excellent example of the difficulty in identifying individual victims of discrimination. The district court found in 1972 that the Patrol had engaged in a blatant and continuous pattern of racial discrimination for 37 years. During that period the Department of Public Safety had not had a single black trooper. In late 1978, nearly seven years after the hiring requirement was imposed, the Department did not have a single black corporal. At the time of the district court's December 1983 order, the Department did not employ a single black at any rank above corporal, and only four of its 66 corporals were black--these four having been promoted under a procedure agreed to in order to settle claims brought by plaintiffs.

It is hard to believe that the government seriously contends that the "last vestiges" of defendants' discriminatory practices can ever be eradicated in such a case, if the defendants are merely required to hire or promote only those blacks who can prove that, as individuals, they are victims of discrimination. Such a limitation on the remedial powers of the courts would simply ignore the realities of employment discrimination. Yet this is precisely the position the government is arguing in an appeal from a promotional order entered by the district court in this case.[7]

Many cases, like Allen, are not limited to findings of individual, discrete wrongs against a few identifiable black victims which could be remedied by making such victims whole. In the real world of employment practices, there are cases, like Allen, that involve long-standing and blatant discrimination against all blacks. The only effective remedy in such cases is one benefitting blacks as a class. United States v. Bethlehem Steel Corp., 446 F.2d 652, 660 (2nd Cir., 1971). Indeed, limiting relief to identifiable individual victims of discrimination would only enable an employer bent on maintaining an all-white work force to succeed in its goal.

Where, as in Allen, there has been blanket and widely known discrimination against all blacks for a long period, it may be impossible in some cases to identify specific individuals who can prove they would have applied for and obtained employment with defendants if not for the employer's policy of discrimination. See United States v. Louisiana, 225 F.Supp. 353, 397 (E.D.La., 1963), aff'd, 380 U.S. 145 (1965).[8] Even if such victims could be identified, "make-whole" relief would be wholly unrealistic. Many of the blacks who might have applied for jobs with the Department of Public Safety during the 37 years of its notorious reputation for discrimination would undoubtedly have gone on to other employment and would no longer be interested in working for the Patrol, *see* *United States v. Sheet Metal Workers International Association, Local Union No. 36*, 416 F.2d 123, 132 (8th Cir., 1969); still others may be dead. And as to those--if such exist--who can prove they would have been hired and are available for hiring now, it would be impossible in some cases to judge what positions they would have attained by now, had they been hired at some point since 1935. Despite these problems of proof, it is beyond doubt that, absent the Patrol's policy of discrimination, *some* blacks would have been hired during that period, and *some* blacks would by now have been promoted. *See* *Teamsters*, *supra*, 431 U.S. at 340 n. 20. The "last vestiges" of such defendants' discrimination cannot be eradicated unless the defendants can be ordered to hire and promote *some* blacks now.

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[7] The appeal was argued in the Eleventh Circuit on April 2, 1985, under the name of Paradise v. Alabama Dept. of Public Safety.

[8] Similarly, where an employer uses a discriminatory testing procedure, it is often impossible to determine which of the blacks who have been denied jobs by virtue of that procedure would have been hired or promoted had a nondiscriminatory procedure been in place. In such cases, only class-based relief can ensure eradication of the effects of discrimination. See, e.g., Ensley Branch, NAACP v. Seibels, 13 E.P.D. (CCH) ¶ 11,504, 14 F.E.P. Cases (BNA) 670 (N.D. Ala. Jan 10, 1977), aff'd in relevant part, 616 F.2d 812 (5th Cir.), cert. denied, 449

In view of the ineffectiveness of "make-whole" relief in cases such as this one, it is plain that an employer determined to continue in its practice of classwide discrimina-

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U.S. 1061 (1980). *And see* *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211, 262 n. 152 (1974):

> ... [A]ctually to assume that employee #242 would have been promoted in three years to such-and-such job instead of employee #354 is so speculative as to unfairly penalize employee #354.

tion would have every incentive to do so, and to prolong employment discrimination litigation to which it is a party, if classwide race-conscious relief were unavailable. In such circumstances, an employer might be faced with a hollow finding of liability but would not be required to do anything inconsistent with maintaining an all-white work force. If identifiable victims of discrimination did come forward, such an employer would be encouraged to prolong the litigation until the plaintiffs move away, seek and gain other employment or die. In short, one can only guess whether there would be a single black state trooper in Alabama today, were it not for the district court's order imposing a hiring goal in 1972--an order that, under the government's present reading of the law, is unlawful.

Allen is not a case in which race-conscious relief was imposed simply to achieve a particular proportion of minority employees, as an end in itself. See 42 U.S.C. § 2000e-2(j). Rather, it is a case in which the outrageous record of discrimination by defendants compels the conclusion that nothing short of affirmative race-conscious relief can even have a chance of erasing the grievous effects of the Patrol's practices. The obstacles proposed by the government in its appeal to the Eleventh Circuit in Allen, and those it is proposing in its other cases, are devices (even if well intentioned as "color blind") which will effectively ensure the preservation and perpetuation of the effects of past discrimination and eliminating any realistic hope that, within the foreseeable future, blacks will be represented in the ranks of the Department of Public Safety in proportions even approaching those that might have been expected were it not for defendants' discriminatory practices. If the Justice Department's wishes prevail, then in effect Governor Wallace would have won.

If this nation is to treat seriously its commitment of fair treatment to members of racial or ethnic minorities, the courts must continue awarding race- or gender-conscious relief, in cases in which such relief is necessary to satisfy that commitment. To deprive the courts of such a remedy where it is the only effective means of relief would be to rob the underlying commitment of any meaning. As Shakespeare wrote in The Merchant of Venice, "You take my house when you take the prop that doth sustain my house."

E. The Justice Department Has Ignored Ongoing Discrimination and Has Chosen Instead to Champion the Interests of White Males

The Justice Department's lawsuit against the Buffalo Police Department is now twelve years old. Yet, three precincts out of 14 are still all-white, and others have only token black representation. None of the 55 Detectives are black; there is only one black police Lieutenant out of 103; and there is only one black police Captain out of 25. In twelve years of litigation, the Civil Rights Division has never gotten around to these problems.

The Justice Department's lawsuit against the Florida Highway Patrol is six years old. Yet, there are only two black

Corporals, and one Hispanic Corporal, in the Highway Patrol. There are no blacks at any higher rank. In six years of litigation, the Civil Rights Division has never gotten around to these problems.

The Justice Department's lawsuit against Pompano Beach, Florida is nine years old. Yet, on April 4, 1985 the local newspaper, the Sun-Sentinel, reported: "To this day, there are no black officers above the rank of patrol officer." In nine years of litigation, the Justice Department had never gotten around to this problem; indeed, it never seems to have gotten around to much of anything, if the same article is correct in its further statement:

> Last summer, a Justice Department attorney visited the city for the first time in seven years and found the city in violation of the consent decree, especially in the police department. An independent management consultant accused police management of an "abysmal" affirmative action program.

The Justice Department filed suit last month against the D.C. Fire Department. Part of its lawsuit challenged the Department's goals and timetables for hiring, and in court papers the Division argued that there was no problem with hiring from the rank-ordered 1980 entry level examination, despite the examination's admitted lack of validity, because all hires were given the same hire date. However, no one who suffered delay in hire from the rank-ordered use of the 1980 test was given any back pay, and there were sharp racial differences in the speed of hire. 29% of all white hires, but only 1% of all black hires, were hired within less than a year of taking the test. 25% of all white hires, and 48% of all black hires, had to wait more than two years after taking the test to be hired. A delay of two or three years in hire is a substantial injury, and the Civil Rights Division would have been carrying out its statutory duties in the manner Congress had intended if it had brought an enforcement action against the D.C. Fire Department to obtain relief for the blacks who had had to wait for such long periods before being hired. Instead, it sued the District in order to enjoin the District's affirmative action plan which, in its hiring provisions, merely eliminated some of the test's adverse impact and did so without requiring blacks to wait longer than whites to be hired.[9]

The Division has intervened as amicus in case after case in the district courts and courts of appeals, to attack affirmative action and champion the interests of white males who ---particularly in promotional cases---often may themselves be the beneficiaries of past racial and sexual discrimination.

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[9] The Justice Department lawsuit also challenged the Fire Department's affirmative action plan on promotions. The district court struck down the promotional parts of the plan, but not on the rigid grounds advanced by the Justice Department. As the district court read the plan, the promotional provisions were too inflexible in light of the facts of the case. The court made clear that it was rejecting the Justice Department's overbroad reading of Stotts and the Justice Department's condemnation of all race-conscious affirmative action not limited to actual victims of discrimination. The court held that the Fire Department could properly take race into account in both hiring and promotions, upheld the hiring part of the plan over Justice's objection, and used traditional principles in finding that the promotional part of the plan was overbroad. Hammon v. Barry, C.A. No. 84-0903 (consolidated) (April 1, 1985).

We submit that it is understandable if the Justice Department brings case after case to enforce the rights of members of minority groups and of women, and concentrates in each case on the biggest problem---that of hiring---while ignoring other significant areas of discrimination because of lack of resources. Even over a six-year or twelve-year span of litigation, justifications based on lack of resources may continue to be credible (always bearing in mind that attorneys with the Department of Justice are no less officers of the court than private counsel, and that a court should be entitled to rely on the Department to perform an adequate job of policing the defendants' conduct and their compliance with the decrees entered by the court). If the Civil Rights Division has too few resources to carry out its statutory responsibilities in its existing cases, and if its lack of resources so cramps its ability to stamp out significant longlasting areas of discrimination in its own cases, however, whence come the resources now being used to carry on its nationwide attacks on affirmative action?

F. The Civil Rights Division is Needlessly Increasing the Burdens on the District Courts

The Chief Justice of the United States has repeatedly called on Congress to be mindful of the burdens on the Federal courts when it passes legislation. We respectfully submit that the Civil Rights Division should be no less mindful of the overcrowded dockets in the district courts.

One of the truly extraordinary features of the Justice

Department's announced plans to re-open its existing decrees in light of its broad reading of Stotts is that it intends to bring on its motions in district courts in which the law of the Circuit already requires denial of its motions to re-open, or in which the law of the Circuit will soon be announced. For example, the Justice Department plans to file motions to re-open five consent decrees in Florida alone.[10] Florida is within the Eleventh Circuit, and the district courts will be bound by whatever decision the Court of Appeals hands down in the Paradise case argued two weeks ago.

The Second Circuit has already rejected a broad reading of Stotts,[11] and the district courts within that Circuit are bound by the Second Circuit's decision. Yet, the Civil Rights Division moved after the issuance of this decision to re-open the Buffalo Police Department case and the Buffalo Fire Department case, and plans to move to re-open three other cases within that Circuit.[12]

On March 11, 1985, the Co-Chairmen of the Lawyers' Committee wrote to the Assistant Attorney General for the Civil Rights Division, to urge that the Division avoid imposing undue burdens on the district courts, by deciding not to file further motions in the district courts to re-open decrees where the court of appeals for the Circuit in question has already rejected the Justice Department's position, or where the court of appeals will shortly decide whether to accept or reject the Department's position. A copy of our letter is attached to this testimony.

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[10] The defendants in these five cases are the Florida Highway Patrol, Pinellas County, Pompano Beach, Fort Lauderdale, and Miami.

[11] EEOC v. Local 638 ... Local 28 of the Sheet Metal Workers Int'l Ass'n, 753 F.2d 1172, 1185-86 (2nd Cir., 1985).

[12] The other three cases are the New York State Police case, the case against the Onondaga County, New York, Sheriff, and the Syracuse, New York Police and Fire case.

Two days later, the Assistant Attorney General wrote back to our Co-Chairmen, stating his view that it would be "irresponsible to allow consent decrees to remain unaltered if they can be interpreted as permitting race or gender hiring, promotion or layoff practices." As to the doctrine of the law of the Circuit, Mr. Reynolds stated:

> Since any lower court decision voicing approval of race or gender preferences is suspect after Stotts, we do not view such a case as an impediment to pursuing this initiative and have no plans to circumscribe our inquiry or limit the courts we ask to hear our modification requests.

It is surprising indeed that an Assistant Attorney General of the United States plans to ask district judges to defy the decisions of the courts of appeals for their Circuits. District judges are legally bound to follow those decisions, until and unless the decisions are reversed or vacated by the Supreme Court. It contravenes the most basic principles of the rule of law to urge that a judicial officer ignore the decisions of a superior court, merely because a governmental litigant thinks they were wrongly decided. We urge the Justice Department to reconsider this course of action.

Conclusion

Once again, we thank you for having invited us to give this testimony today. As we have shown, the Civil Rights Division has misallocated its resources and has misread the law. Its nationwide attack on affirmative action will further waste its resources and divert its energies away from the purposes Congress intended. We urge that Congress exercise its power of oversight, and through an appropriate rider on the authorization legislation, and on any continuing resolution, curb this excess.

LAWYERS' COMMITTEE
FOR CIVIL RIGHTS UNDER LAW

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CABLE ADDRESS: LAWCIV, WASHINGTON, D.C.

March 11, 1985

Hon. William Bradford Reynolds
Assistant Attorney General
Civil Rights Division
U.S. Department of Justice
Tenth and Pennsylvania N.W.
Washington, D.C. 20530

Re: The Justice Department's Announced Plans
to Move for the Eliminations of Goals
and Timetables in 46 of its Employment Cases

Dear Mr. Reynolds:

According to statements which have appeared in the press, the Department plans to re-open 46 of the settled or litigated decrees it has obtained in employment discrimination cases, and in each of these cases will seek to eliminate race-conscious and sex-conscious relief, usually in the form of hiring and promotional goals and timetables. This effort is pursuant to the Department's broad reading of the decision in Firefighters Local Union No. 1784 v. Stotts, 104 S.Ct. 2576 (1984).

While the Department has so far refused to release the names of the 46 cases selected for re-opening decrees, the names of the cases selected for review, from which the 46 were chosen, has become public knowledge. Our tabulation of these names is attached for ease of reference.

A glance at the list shows that there are many cases included within the review, and presumably many cases within the 46 selected for re-opening decrees, located within Circuits which have either already decided the effective reach of the Stotts decision, or in which the issue is still pending. For example, the First Circuit will decide the reach of Stotts in Devereaux v. Geary, No. 84-2004. Three Massachusetts cases are on the review list. The Eleventh Circuit will decide these issues in Paradise v. Dept. of Public Safety, No. 84-7053. Four Alabama cases, five Florida cases, and five Georgia cases are on the review list. Many other examples could be given.

The public debate over the impact of Stotts will ultimately be resolved by the courts. Our concern in this letter is not with the ultimate result in such litigation, but with the manner of obtaining such a resolution. Where the court of appeals for a particular Circuit has already handed down its decision on the impact of Stotts and has rejected the Department's position, district courts within the Circuit are required to follow that decision until and unless the Supreme Court speaks to the contrary. In such circumstances, no purpose would be served by filing motions asking the district courts within that Circuit to to re-open decrees pursuant to a reading of Stotts rejected by case law controlling within the Circuit. Similarly, where the court of appeals already has a case before it in which this question must be decided, no purpose is served by asking district courts within the Circuit to re-open decrees prior to issuance of the decision that will be controlling within the Circuit.

While we read the Stotts decision more narrowly than the Department reads it, both sides in the debate should be able to find common ground in avoiding undue burden on the district courts. We urge you not to file further motions in the district courts to re-open decrees where the court of appeals for the Circuit in question has already rejected the Department's broad reading of Stotts, or where the court of appeals for that Circuit will shortly decide whether to accept or reject the Department's position.

Very truly yours,

Fred N. Fishman
Fred N. Fishman

Robt H. Kapp
Robert H. Kapp
Co-Chairmen

Civil Rights Division

Office of the Assistant Attorney General
Washington, D.C. 20530

March 13, 1985

Mr. Fred N. Fishman
Mr. Robert H. Kapp
Lawyers' Committee for Civil
 Rights Under Law
Suite 400
1400 Eye Street, N.W.
Washington, D. C. 20005

Gentlemen:

Thank you for your March 11 letter requesting reconsideration of our decision to review outstanding consent decrees and, where necessary, to seek modification of language to assure compliance with Stotts.

It would, in our view, be irresponsible to allow consent decrees to remain unaltered if they can be interpreted as permitting race or gender hiring, promotion or layoff practices. Accordingly, we cannot after Stotts, as you seem to suggest, simply blink at such provisions.

We therefore plan to proceed as indicated with respect to all consent decrees we determine to be in need of clarification or modification. Since any lower court decision voicing approval of race or gender preferences is suspect after Stotts, we do not view such a case as an impediment to pursuing this initiative and have no plans to circumscribe our inquiry or limit the courts we ask to hear our modification requests.

Thank you again for writing and sharing your thoughts with me.

Sincerely,

Wm. Bradford Reynolds
Assistant Attorney General
Civil Rights Division

LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW
OF THE BOSTON BAR ASSOCIATION
294 WASHINGTON STREET • BOSTON, MASSACHUSETTS 02108 • (617) 482-1145

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Executive Director
Barbara R. Arnwine

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Alan Jay Rom
Victoria A. Judson

Director, Project to Combat Racial Violence
Robert P. Sherman

Office Manager
DaNita A. Davis

June 3, 1985

Senator Strom Thurmond
Chairman, Senate Judiciary Committee
Room 218
Russell Senate Office Building
Washington, D.C. 20510

Re: Nomination of William Bradford Reynolds As Associate Attorney General

Dear Mr. Chairman:

On behalf of members of the Lawyers' Committee for Civil Rights Under Law of the Boston Bar Association, please find attached a signed statement prepared by the Lawyers' Committee For Civil Rights Under Law in opposition to the nomination of William Bradford Reynolds as Associate Attorney General.

On April 5, 1985, we argued before the United States Court of Appeals For The First Circuit as amici the case of Deveraux v. Geary, 596 F. Supp. 1981 (D. Mass. 1984); No. 84-2004 (1st Cir.), in which the Justice Department appeared as amicus seeking to overturn a court ordered consent decree based on the United States Supreme Court decision in Firefighters Local Union No. 1784 v. Stotts, ____ U.S. ____, 104 S. Ct. 2576, 81 L.Ed 2d. 483, 52 U.S.L.W. 4767 (June 12, 1984). The Justice Department argued as it has in numerous other cases that the Stotts opinion prohibits court ordered affirmative action. The numerous courts considering similar challenges by the Justice Department have found no legal basis for reading Stotts broadly to eradicate affirmative action goals, quotas and timetables. This case amply illustrates Mr. Reynold's misapplication of political ideology to the legal process in that the Justice Department continued its policy of opposition despite an overwhelming body of law to the contrary.

Clearly, the continued opposition by Mr. Reynolds to court ordered affirmative action is ideological. The Associate Attorney General should have a strong commitment to civil rights enforcement that is grounded in pursuing the law as interpreted by the courts.

For this reason and the many others cited in the attached statement, we feel that Mr. Reynolds is incapable of fulfilling the mandate of the Associate Attorney General and therefore his nomination should not be confirmed.

Sincerely,

Barbara R. Arnwine

BRA/kh

cc: Hugh R. Jones, Esq., Chairman
John Taylor Williams, Esq., Vice-Chairman
William L. Robinson, Esq., Executive Director, Lawyers' Committee For Civil Rights Under law

Signed by the following members of the Lawyers' Committee for Civil Rights Under Law of the Boston Bar Association.

Hugh R. Jones, Jr., Esq. (Chairman)

John Taylor Williams, Esq. (Vice-Chairman)

John F. Adkins, Esq.

Edward J. Barshak, Esq.

G. d'Andelot Belin, Esq.

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Judith O. Brown, Esq.

Charles C. Cabot, Jr., Esq.

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Nicholas U. Sommerfeld, Esq.

Joseph D. Steinfield, Esq.

Thomas V. Urmy, Esq.

Dianne Wilkerson, Esq.

Zipporah Batshaw Wiseman, Esq.

The CHAIRMAN. Mr. Jacob, we will be glad to hear from you now.

STATEMENT OF JOHN E. JACOB

Mr. JACOB. Thank you, Mr. Chairman and members of the committee.

Mr. Chairman, I have submitted for the record a more extensive statement and therefore in the interest of time, I shall speak from a shorter statement.

My name is John E. Jacob, and I am president and chief executive officer of the National Urban League.

As an organization firmly committed to securing equal opportunities in all sectors of society for blacks, women, and other minorities, we appreciate the opportunity to present our views regarding Mr. Reynolds' nomination as Associate Attorney General.

The National Urban League urges that this committee reject the nomination of William Bradford Reynolds as Associate Attorney General of the United States. Our conclusion is based on Mr. Reynolds' record as head of the Justice Department's Civil Rights Division and on the extraordinary position he has taken on key issues affecting the civil rights of blacks, women, and other minorities.

Under his direction, the Civil Rights Division has become an obstacle to the elimination of racial barriers in our society, instead of fulfilling its duty to be an effective instrument to tear down those racial barriers. The burden of the record of Mr. Reyholds' stewardship of the Civil Rights Division indicates that he has presided over the weakening of Federal civil rights enforcement efforts, has actively impeded efforts to remedy civil rights violations and has undermined civil rights principles established by the Congress and the Judiciary. That record renders Mr. Reynolds unfit to hold an office that would increase his power and his influence in the Government's Department most concerned with protecting and enforcing minority rights.

It would take a thick volume to detail the negative policies implemented by Mr. Reynolds and the retrogressive views he holds that have united the civil rights community against his nomination.

But by way of reference, let me just say a little bit about employment discrimination.

In employment discrimination, Mr. Reynolds has again substituted his own interpretation of the law and of court rulings for established law and practice.

It has been generally understood that the damage done by years of overt discrimination and by the subtle forms of discrimination in current use severely impact upon equal employment opportunities for black Americans and other minorities.

The generally accepted method of remedying that situation is to establish affirmative action plans that ensure equal opportunity for qualified minorities. Mr. Reynolds, however, has spent the past 4 years waging war on effective affirmative action plans. He has engaged in demagogic statements labeling such plans a racial spoils system and stigmatizing numerical goals as quotas. He has claimed that such plans discriminate against whites, when in fact, virtually all such plans have had extremely limited impact on white citizens, and many have actually broadened opportunities for whites as well as blacks.

This committee would send a terrible message to the American people if it confirms the nomination of Mr. Reynolds at the very moment when the Justice Department is engaged in a campaign to intimidate State and local jurisdictions operating affirmative action plans under Federal consent decrees.

Mr. Reynolds' claim that this is a racially neutral society in which racial distinctions have no place—that is a fine sentiment, but it is out of touch with the reality of an America in which blacks suffer disproportionate disadvantage on equal opportunities and considerable discrimination.

We are striving to create a colorblind society, and our efforts must temporarily implement race and genderconscious policies that advance us toward that goal. Whether you agree with that proposition or not is immaterial today. The fact is that the record shows that Congress and the courts and previous administrations have consitently upheld it. The fact is that the head of the Civil Rights Division of the Justice Department is supposed to uphold it as well and is supposed to wield the sword of the law to defend minority civil rights. The fact is that Mr. Reynolds has used that sword of the law to hack away at the victim—to subvert minority civil rights.

The fact, therefore, is that Mr. Reynolds should not be promoted to a post where he would be in a position to do still more damage.

I urge this committee, Mr. Chairman, to refuse to confirm Mr. Reynolds.

The CHAIRMAN. Thank you, Mr. Jacobs.

[Statement follows:]

Testimony of

JOHN E. JACOB
PRESIDENT AND
CHIEF EXECUTIVE OFFICER
NATIONAL URBAN LEAGUE, INC.

In behalf of the
NATIONAL URBAN LEAGUE, INC.

MY NAME IS JOHN E. JACOB, AND I AM PRESIDENT AND CHIEF EXECUTIVE OFFICER OF THE NATIONAL URBAN LEAGUE.

THE NATIONAL URBAN LEAGUE (NUL) IS A NON-PROFIT COMMUNITY SERVICE ORGANIZATION DEDICATED TO SEEKING ACHIEVEMENT OF PARITY FOR BLACKS AND OTHER MINORITIES IN EVERY PHASE OF AMERICAN LIFE. THROUGH ITS 113 AFFILIATES LOCATED IN 34 STATES, THE LEAGUE SERVES MORE THAN A MILLION INDIVIDUALS EACH YEAR.

AS AN ORGANIZATION FIRMLY COMMITTED TO SECURING EQUAL OPPORTUNITIES IN ALL SECTORS OF SOCIETY FOR BLACKS, WOMEN, AND OTHER MINORITIES, WE APPRECIATE THE OPPORTUNITY TO PRESENT OUR VIEWS REGARDING MR.REYNOLDS' NOMINATION AS ASSOCIATE ATTORNEY-GENERAL.

THE NATIONAL URBAN LEAGUE URGES THAT THIS COMMITTEE REJECT THE NOMINATION OF WILLIAM BRADFORD REYNOLDS AS ASSOCIATE ATTORNEY GENERAL OF THE UNITED STATES.

OUR CONCLUSION IS BASED ON MR. REYNOLDS' RECORD AS HEAD OF THE JUSTICE DEPARTMENT'S CIVIL RIGHTS DIVISION, AND ON THE EXTRAORDINARY POSITIONS HE HAS TAKEN ON KEY ISSUES AFFECTING THE CIVIL RIGHTS OF BLACKS, WOMEN AND OTHER MINORITIES.

UNDER HIS DIRECTION, THE CIVIL RIGHTS DIVISION HAS

BECOME AN OBSTACLE TO THE ELIMINATION OF RACIAL BARRIERS IN OUR SOCIETY, INSTEAD OF FULFILLING ITS DUTY TO BE AN EFFECTIVE INSTRUMENT TO TEAR DOWN THOSE RACIAL BARRIERS.

THE BURDEN OF THE RECORD OF MR. REYNOLDS' STEWARDSHIP OF THE CIVIL RIGHTS DIVISION INDICATES THAT HE HAS PRESIDED OVER THE WEAKENING OF FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORTS, HAS ACTIVELY IMPEDED EFFORTS TO REMEDY CIVIL RIGHTS VIOLATIONS, AND HAS UNDERMINED CIVIL RIGHTS PRINCIPLES ESTABLISHED BY THE CONGRESS AND THE JUDICIARY.

THAT RECORD RENDERS MR. REYNOLDS UNFIT TO HOLD AN OFFICE THAT WOULD INCREASE HIS POWERS AND HIS INFLUENCE IN THE GOVERNMENT'S DEPARTMENT MOST CONCERNED WITH PROTECTING AND ENFORCING MINORITY RIGHTS.

IT WOULD TAKE A THICK VOLUME TO DETAIL THE NEGATIVE POLICIES IMPLEMENTED BY MR. REYNOLDS, AND THE RETROGRESSIVE VIEWS HE HOLDS THAT HAVE UNITED THE CIVIL RIGHTS COMMUNITY AGAINST HIS NOMINATION.

I WILL THEREFORE TOUCH ON A HANDFUL OF THE INSTANCES WHERE WE BELIEVE HE HAS DEMONSTRATED BY HIS ACTIONS AND HIS VIEWS THAT HE IS UNFIT FOR HIGHER OFFICE.

ON THE ISSUE OF LAW ENFORCEMENT, MR. REYNOLDS' CIVIL RIGHTS DIVISION HAS DEMONSTRATED A CONTEMPT OF CONGRESS THROUGH ITS REFUSAL TO CARRY OUT LEGISLATIVE MANDATES FOR VIGOROUS LAW ENFORCEMENT ACTION.

IT HAS FAILED TO PROPERLY ENFORCE THE VOTING RIGHTS ACT BY PRECLEARING CHANGES IN COVERED JURISDICTIONS THAT WERE REJECTED IN SUBSEQUENT COURT ACTION. THE DIVISION HAS ALSO TWISTED THE CLEAR INTENT OF CONGRESS BY TELLING A COURT IN A SUMTER, SOUTH

CAROLINA CASE, THAT CHALLENGERS TO ELECTION PLAN CHANGES HAVE THE BURDEN TO PROVE VIOLATIONS OF THE ACT.

CURRENTLY, THE DIVISION IS ENGAGED IN AN ATTEMPT TO CONVINCE THE SUPREME COURT TO OVERTURN A LOWER COURT RULING THAT WOULD ESTABLISH SINGLE-MEMBER DISTRICTS FOR NORTH CAROLINA'S LEGISLATURE IN PLACE OF THE PRESENT SYSTEM OF MULTI-MEMBER DISTRICTS THAT DILUTES BLACK REPRESENTATION.

IN PAST YEARS, THE CIVIL RIGHTS DIVISION WAS THE GUARDIAN OF BLACK VOTING RIGHTS. UNDER MR. REYNOLDS' DIRECTION, IT HAS BECOME AN OBSTACLE TO THOSE RIGHTS, AND A SOURCE OF AID AND COMFORT TO THOSE WHO WOULD ERODE THEM.

THE DIVISION HAS ALSO FAILED TO ENFORCE THE FAIR HOUSING ACT. ALTHOUGH IT IS CHARGED WITH THE DUTY TO LITIGATE CASES INVOLVING A "PATTERN OR PRACTICE" OF DISCRIMINATION, IT HAS BROUGHT FEWER HOUSING DISCRIMINATION CASES THAN IN PREVIOUS ADMINISTRATIONS.

THE DIVISION'S FEEBLE RESPONSE TO THE MANDATE TO ENFORCE THE FAIR HOUSING ACT WOULD BE BAD ENOUGH, BUT IT HAS ALSO WEAKENED ITS ABILITY TO CARRY OUT CONGRESS' WILL BY ADOPTING THE "INTENT" TEST RATHER THAN THE MORE EFFECTIVE AND COMPREHENSIVE "EFFECTS" TEST OF DISCRIMINATION, DESPITE THE FACT THAT THE "EFFECTS" TEST IS THE CLEAR LEGAL STANDARD IN SUCH CASES.

THE "INTENT" TEST REQUIRES PROOF THAT DISCRIMINATION WAS INTENDED -- IT DEMANDS A "SMOKING GUN" IN THE FORM OF WRITTEN OR ORAL STATEMENTS INDICATING INTENT TO DISCRIMINATE.

BY CONTRAST, THE "EFFECTS" TESTS MAKES DISCRIMINATORY EFFECTS SUSPECT AND FACILITATES REMEDIAL ACTION. THE "EFFECTS" TEST HAS BEEN RECOGNIZED AS THE

LEGAL STANDARD BY EVERY PRIOR ADMINISTRATION, BY FEDERAL COURTS, AND BY CONGRESSIONAL COMMITTEES, INCLUDING THE SENATE JUDICIARY COMMITTEE WHEN IT CONSIDERED AMENDMENTS TO THE FAIR HOUSING ACT IN 1980.

WHILE THE SUPREME COURT HAS ON OCCASION RELIED ON THE "INTENT" TEST TO ESTABLISH CONSTITUTIONAL VIOLATIONS BY GOVERNMENTS, IT HAS CONSISTENTLY RULED THAT PROOF OF RACIALLY DISPARATE EFFECTS ORDINARILY CAN SERVE TO ESTABLISH VIOLATIONS OF THE CIVIL RIGHTS ACT OF 1964. MOST FEDERAL APPEALS COURTS HAVE RELIED ON THE "EFFECTS" TEST IN CASES INVOLVING VIOLATIONS OF THE FAIR HOUSING ACT.

BY REFUSING TO USE THE "EFFECTS" TEST, THE CIVIL RIGHTS DIVISION ENSURES THAT IT WILL BE HANDICAPPED IN CONTESTING CIVIL RIGHTS. AS THE NEW YORK TIMES COMMENTED ON THIS ISSUE:

"IF YOU DO NOT LIKE A LAW OR THINK THAT IT GOES TOO FAR, THE BEST WAY TO WEAKEN IT OR NARROW IT IS TO MAKE IT HARDER TO PROVE A VIOLATION. ONE WAY TO DO THAT IS . . . TO SPECIFY THAT ACTIONS THAT PRODUCE CERTAIN UNDESIRABLE RESULTS ARE ILLEGAL ONLY IF UNDERTAKEN WITH THE INTENT OF DOING SO."

MR. REYNOLDS' DUTY AS HEAD OF THE CIVIL RIGHTS DIVISION IS TO ENFORCE THE LAW USING ACCEPTED STANDARDS OF PROOF, NOT TO WEAKEN THE LAW BY ADOPTING STANDARDS THAT IMPEDE EFFECTIVE ENFORCEMENT.

IN EDUCATION, THE CIVIL RIGHTS DIVISION HAS ACTED TO RETARD SCHOOL DESEGREGATION AND TO POSITIVELY ENCOURAGE THOSE WHO DISCRIMINATE. I NEED ONLY MENTION THE BOB JONES CASE, AS AN EXAMPLE OF THE DIVISION'S EFFORTS -- IN DEFIANCE OF ESTABLISHED LAW AND THE LEGISLATIVE RECORD -- TO REWARD RACIAL DISCRIMINATION WITH A TAX EXEMPTION.

In the Bob Jones case, the Supreme Court unanimously rejected the Division's position. However, in the Grove City case, a majority of the Justices agreed with the Division's extremely narrow interpretation of Title Nine of the Education Amendments Act of 1972.

Since the clear intent of the Congress was to provide for compliance by any institution receiving federal funds, the Division betrayed its duty by arguing that only direct use of federal funds in a discriminatory program could be punished by a cutoff of those funds.

The clear effect of the Division's interpretation is to grant a license to discriminate without fear of punishment. The Congress is now considering bills that would reverse that Court decision, and we urge swift passage to restore the federal government's most effective anti-discrimination weapon.

It appears to be the clear desire of a Congressional bi-partisan majority to reverse the Court decision and the narrow interpretation that led to it. I suggest to you that this Congressional majority also implies a rejection of Mr. Reynolds' interpretation of the law and of his leadership of the Civil Rights Division in the Grove City case. It would be hard to reconcile such a rejection with approval of his nomination to a higher post.

Mr. Reynolds has also subverted the intent of Congress and the courts by challenging school desegregation plans, including plans that were voluntarily adopted by communities and upheld by federal courts. While many oppose the use of busing to desegregate unconstitutionally segregated schools, the

COURTS, INCLUDING THE SUPREME COURT, HAVE CONSISTENTLY UPHELD IT AS ONE OF THE TOOLS BY WHICH DESEGREGATION CAN BE EFFECTED.

MR. REYNOLDS' ABSOLUTE REFUSAL TO ACCEPT THE LEGITIMACY OF DESEGREGATION PLANS INCLUDING BUSING NOT ONLY LIMITS HIS DIVISION'S EFFECTIVENESS IN ENFORCING THE LAW, BUT IT SUBSTITUTES HIS PERSONAL VIEWS FOR THOSE OF ESTABLISHED CIVIL RIGHTS LAW. THE NET EFFECT IS TO RETARD DESEGREGATION EFFORTS, AND TO DISCOURAGE VOLUNTARY ATTEMPTS BY COMMUNITIES TO COMPLY WITH THE LAW.

IN EMPLOYMENT DISCRIMINATION, MR. REYNOLDS HAS AGAIN SUBSTITUTED HIS OWN INTERPRETATIONS OF THE LAW AND OF COURT RULINGS FOR ESTABLISHED LAW AND PRACTICE.

IT HAS BEEN GENERALLY UNDERSTOOD THAT THE DAMAGE DONE BY YEARS OF OVERT DISCRIMINATION AND BY THE SUBTLE FORMS OF DISCRIMINATION IN CURRENT USE SEVERELY IMPACT UPON EQUAL EMPLOYMENT OPPORTUNITIES FOR BLACK AMERICANS AND OTHER MINORITIES.

THE GENERALLY ACCEPTED METHOD OF REMEDYING THAT SITUATION IS TO ESTABLISH AFFIRMATIVE ACTION PLANS THAT ENSURE EQUAL OPPORTUNITIES FOR QUALIFIED MINORITIES.

IN A SERIES OF DECISIONS -- THE BAKKE, WEBER, FULLILOVE AND STOTTS CASES -- THE SUPREME COURT HAS DEFINED AND PLACED LIMITS ON SUCH AFFIRMATIVE ACTION PLANS. NUMEROUS LOWER COURTS HAVE ALSO UPHELD SUCH PLANS, AND MANY FEDERAL COURTS HAVE ORDERED IMPLEMENTATION OF AFFIRMATIVE ACTION PLANS THAT INCLUDE NUMERICAL GOALS AND TIMETABLES TO ENSURE COMPLIANCE.

MR. REYNOLDS, HOWEVER, HAS SPENT THE PAST FOUR YEARS WAGING WAR ON EFFECTIVE AFFIRMATIVE ACTION PLANS.

HE HAS ENGAGED IN DEMAGOGIC STATEMENTS LABELLING SUCH PLANS "A RACIAL SPOILS SYSTEM" AND STIGMATIZING NUMERICAL GOALS AS "QUOTAS." HE HAS CLAIMED THAT SUCH PLANS DISCRIMINATE AGAINST WHITES, WHEN IN FACT VIRTUALLY ALL SUCH PLANS HAVE HAD EXTREMELY LIMITED IMPACT ON WHITE CITIZENS, AND MANY HAVE ACTUALLY BROADENED OPPORTUNITIES FOR WHITES AS WELL AS BLACKS.

WHATEVER THE POTENTIAL FOR ABUSE, THE LIMITS PLACED ON AFFIRMATIVE ACTION PLANS BY THE SUPREME COURT CERTAINLY ENSURE THAT THEY WILL REMAIN EFFECTIVE REMEDIAL EFFORTS THAT SUPPORT THE NATIONAL INTEREST IN EXPANDING EQUAL OPPORTUNITY FOR ALL.

THIS COMMITTEE WOULD SEND A TERRIBLE MESSAGE TO THE AMERICAN PEOPLE IF IT CONFIRMS THE NOMINATION OF MR. REYNOLDS AT THE VERY MOMENT WHEN THE JUSTICE DEPARTMENT IS ENGAGED IN A CAMPAIGN TO INTIMIDATE STATE AND LOCAL JURISDICTIONS OPERATING AFFIRMATIVE ACTION PLANS UNDER FEDERAL COURT CONSENT DECREES.

THE DEPARTMENT'S ACTION IS BASED ON A WILFULL MISREADING OF THE STOTTS CASE IN WHICH THE COURT LIMITED THE REACH OF AN AFFIRMATIVE ACTION PLAN IN CONFLICT WITH A BONA FIDE CONTRACTUAL SENIORITY SYSTEM.

FROM THAT LIMITED RULING, MR. REYNOLDS AND HIS DIVISION HAVE DEMANDED AN END TO PLANS THAT INCLUDE NUMERICAL GOALS AND TIMETABLES. THERE IS NO BASIS FOR SUCH AN INTERPRETATION OF STOTTS, AND THE DIVISION IS CLEARLY ENGAGED IN TRYING TO SUBVERT FEDERAL COURT DECREES AND TO END EFFECTIVE PROGRAMS THAT HAVE WIDENED MINORITY EMPLOYMENT OPPORTUNITIES.

AS FIVE MEMBERS OF THE HOUSE JUDICIARY COMMITTEE WROTE ATTORNEY-GENERAL MEESE ON MAY 2:

> "EMPLOYMENT DISCRIMINATION CASES USUALLY

> STEM FROM A LONG HISTORY OF EXCLUSION OF MINORITIES AND WOMEN FROM THE WORKPLACE. AFFIRMATIVE ACTION REMEDIES WHICH INCLUDE RACE AND GENDER-CONSCIOUS REMEDIES HAVE PROVED TO BE AN EFFECTIVE MEANS TO COMBAT DISCRIMINATION AND TO BRING MINORITIES AND WOMEN INTO THE MAINSTREAM. ON A PRACTICAL LEVEL, WE BELIEVE THAT REOPENING THESE CASES WILL HAVE THE UNDESIRED EFFECT OF INCREASING TENSIONS IN COMMUNITIES ALL ACROSS THE COUNTRY, BY DISRUPTING PROGRAMS WHICH HAVE BEEN SUCCESSFUL IN MEETING THEIR OBJECTIVES. WE UNDERSTAND, AS WELL, THAT MOST OF THE JURISDICTIONS HAVE INDICATED THAT THEY HAVE NO DESIRE TO REOPEN THESE CASES, ARE SATISFIED WITH THE RESULTS OF THEIR AFFIRMATIVE ACTION PROGRAMS, AND HAVE ASKED THE DEPARTMENT NOT TO INTERFERE WITH THEM."

MR. REYNOLDS AVERSION TO NUMERICAL GOALS IS SO STRONG THAT HE HAS ARGUED AGAINST "RELIANCE ON REPORTING OR OTHER REQUIREMENTS THAT INSIST ON GROUPING INDIVIDUALS ACCORDING TO SKIN COLOR OR GENDER FOR THE PURPOSE OF OPENING AND CLOSING EMPLOYMENT OPPORTUNITIES BASED UPON NUMERICAL FORMULAS THAT COUNT RACE OR SEX."

IF RACE OR SEX IS NOT COUNTED, HOW CAN WE PROVE DISCRIMINATION? I FIND THE REYNOLDS FORMULA OF DESPENSING WITH SUCH STATISTICS VERY SIMILAR TO HIS USE OF THE "INTENT" TEST -- A MEANS TO THE END OF HAMPERING EFFECTIVE REMEDIES FOR DISCRIMINATORY ACTIONS.

THAT HELPS ACCOUNT FOR HIS ATTEMPT TO SUBVERT THE SO-CALLED "EIGHT-FACTOR ANALYSIS" PROCEDURE TO DETERMINE COMPLIANCE WITH FAIR HIRING LAWS. THAT METHOD IS USED BY THE LABOR DEPARTMENT'S OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS. IT IS A PROVEN, FAIR METHOD TO DETERMINE WHETHER CONTRACTORS ARE MAKING PROGRESS IN EQUAL EMPLOYMENT OPPORTUNITY. THE EIGHT FACTORS, OF COURSE, DEMAND DETAILED STATISTICS. BY TRYING TO DO AWAY WITH STATISTICALLY-BASED COMPLIANCE PROCEDURES, MR. REYNOLDS IS TRYING TO DO AWAY WITH EFFECTIVE COMPLIANCE.

STUDY AFTER STUDY, INCLUDING THOSE MADE BY THE OFCCP, HAS DOCUMENTED THE FACT THAT COMPANIES DOING BUSINESS WITH THE GOVERNMENT -- AND THEREFORE SUBJECT TO FEDERAL COMPLIANCE AND STATISTICAL PROCEDURES -- HAVE HIGHER LEVELS OF MINORITY EMPLOYMENT THAN COMPANIES NOT SUBJECT TO THOSE COMPLIANCE MANDATES. CLEARLY, AFFIRMATIVE ACTION HAS CONTRIBUTED TO OCCUPATIONAL ADVANCES BY MINORITIES AND WOMEN. AND WITHOUT NUMERICAL GOALS AND RECORD-KEEPING REQUIREMENTS THOSE ADVANCES WOULD MELT AWAY.

MR. REYNOLDS' DISLIKE OF NUMERICAL GOALS IN HIRING AND PROMOTION EXTENDS TO HIS ATTEMPT TO DESTROY LOCAL SET-ASIDE PROGRAMS FOR MINORITY BUSINESS. I MUST REMIND THIS COMMITTEE THAT THE CONGRESS HAS ESTABLISHED SUCH SET-ASIDES FOR MINORITY CONTRACTORS IN ORDER TO STIMULATE THE BLACK ECONOMY, TO REMEDY PAST DISCRIMINATORY ACTION AGAINST BLACK BUSINESSES, AND TO ENSURE THAT THIS STRUGGLING SECTOR OF OUR PRIVATE ECONOMY HAS THE OPPORTUNITY TO COMPETE FOR THE BUSINESS OF ITS OWN GOVERNMENT. THE SUPREME COURT, IN THE FULLILOVE CASE, HAS UPHELD CONGRESS' DECISION.

ONE WOULD EXPECT THEN, THAT THE OFFICER CHARGED

WITH ENFORCING THE LAW WOULD NOT DISRUPT THE PRINCIPLES ADOPTED BY TWO BRANCHES OF THE GOVERNMENT -- THE CONGRESS AND THE JUDICIARY. MR. REYNOLDS, HOWEVER, HAS SOUGHT TO SUBSTITUTE HIS OWN WISDOM FOR THEIRS, AND HAS BROUGHT SUIT AGAINST DADE COUNTY, FLORIDA TO OVERTURN A LOCAL ORDINANCE SETTING ASIDE SOME CONSTRUCTION CONTRACTS FOR BLACK CONTRACTORS.

TO SUPPORT COLOR-BLIND POLICIES IN A COLOR-CONSCIOUS SOCIETY IS TO PERPETUATE DISCRIMINATION AND TO SUBVERT THE CIVIL RIGHTS LAWS -- AND THAT IS WHAT MR. REYNOLDS HAS DONE.

MR. REYNOLDS CLAIMS THIS IS A RACIALLY NEUTRAL SOCIETY IN WHICH RACIAL DISTINCTIONS HAVE NO PLACE. A FINE SENTIMENT. BUT IT IS OUT OF TOUCH WITH THE REALITY OF AN AMERICA IN WHICH BLACKS SUFFER DISPROPORTIONATE DISADVANTAGE, UNEQUAL OPPORTUNITIES, AND CONSIDERABLE DISCRIMINATION.

WE ARE STRIVING TO CREATE A COLOR-BLIND SOCIETY AND OUR EFFORTS MUST TEMPORARILY IMPLEMENT RACE-AND-GENDER CONSCIOUS POLICIES THAT ADVANCE US TOWARD THAT GOAL.

WHETHER YOU AGREE WITH THAT PROPOSITION OR NOT IS IMMATERIAL TODAY. THE FACT IS THAT THE RECORD SHOWS THAT CONGRESS AND THE COURTS AND PREVIOUS ADMINISTRATIONS HAVE CONSISTENTLY UPHELD IT.

THE FACT IS THAT THE HEAD OF THE CIVIL RIGHTS DIVISION OF THE JUSTICE DEPARTMENT IS SUPPOSED TO UPHOLD IT, AS WELL, AND IS SUPPOSED TO WIELD THE SWORD OF THE LAW TO DEFEND MINORITY CIVIL RIGHTS.

THE FACT IS THAT MR. REYNOLDS HAS USED THAT SWORD OF THE LAW TO HACK AWAY AT THE VICTIM -- TO SUBVERT MINORITY CIVIL RIGHTS.

THE FACT THEREFORE IS THAT MR. REYNOLDS SHOULD NOT BE PROMOTED TO A POST WHERE HE WOULD BE IN A POSITION TO DO STILL MORE DAMAGE.

I URGE THIS COMMITTEE TO REFUSE TO CONFIRM MR. REYNOLDS.

The CHAIRMAN. Mr. Snapper, I understood you especially wanted just a few seconds more.

Mr. SNAPPER. When my time ran out, there was one other statement I thought out of fairness and completeness, I ought to make.

Yesterday, Mr. Reynolds on a number of occasions stated that the Civil Rights Division had filed briefs in Supreme Court cases which were favorable to plaintiffs in those cases. I cannot speak to Mr. Reynolds' personal role in the writing or approval of those briefs, but I would not want my silence to be construed as suggesting that that had not occurred.

Mr. Reynolds is entitled to an acknowledgement that he has taken some positive steps, and he is entitled to have that considered. I do not think that it is sufficient to warrant his confirmation, but I think that he is entitled to have his full record on the table.

The CHAIRMAN. Thank you.

I guess I have given a broader opportunity here in this hearing than has ever been given in a Senate hearing to hear different groups and organizations and individuals. Over 50 witnesses have asked to testify here, and we have tried to arrange to accommodate them.

Our next panel is panel 3, but we are going to recess now until 2:15 to give an opportunity for Senator Hatch to get here at that time.

[Whereupon, at 1:22 p. m., the committee was recessed, to reconvene at 2:15 p. m. this same day.]

AFTERNOON SESSION

Senator SIMON [presiding]. The hearing will resume.

I am taking the chair only very temporarily until the chairman returns. We will hear now from panel 3, Mark de Bernardo, Roy Innis, Dennis Rapps, Carlos Benitez, and Richard Fox. We will hear from all of the members of the panel.

We have only two of those members of the panel here apparently. We are pleased to have you here. And if you can introduce yourselves and then give us your testimony.

TESTIMONY OF PANEL CONSISTING OF MARK A. DE BERNARDO, MANAGER OF LABOR LAW, U.S. CHAMBER OF COMMERCE, WASHINGTON, DC, AND DENNIS RAPPS, EXECUTIVE DIRECTOR AND GENERAL COUNSEL, NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS, NEW YORK, NY

Mr. **de Bernardo**. Thank you, Senator. I am Mark A. de Bernardo, manager of labor law for the Chamber of Commerce of the United States.

I am pleased to have this opportunity to appear before this Committee on the Judiciary and express the chamber's full and unqualified support for the appointment of William Bradford Reynolds as Associate Attorney General of the United States. We urge this committee to report favorably Mr. Reynolds' nomination.

In our written statement we have a discussion of the qualifications of Mr. Reynolds for the position of Associate Attorney General and we detail his professional and academic credentials, his 20 years of experience in both the public and private sectors, his performance in his current position as Assistant Attorney General, his managerial experience, and his dedication and commitment to the Reagan administration in which he serves. For the sake of brevity, I will not read this part of our testimony.

I do wish to comment regarding the politics of the Presidential appointment process. We find it regrettable that some opponents would use the confirmation process and these hearings as a forum to attack the administration and its policies or to protest in frustration recent legal interpretations by the courts of our civil rights and responsibilities.

Qualified individuals such as Mr. Reynolds should not be denied a Presidential appointment simply because opponents disagree with administration policies.

This administration, like all administrations in our form of government, was elected by the popular vote of the people. It is not only the Presidential prerogative, it is also the Presidential mandate to appoint appropriate individuals who will carry out the President's campaign goals and promises.

The Reagan administration was elected overwhelmingly, with majorities in 49 States whose mandate was 4 more years of the policies and philosophies of President Reagan as typified by Mr. Reynolds' performance as Assistant Attorney General.

Although a vote for candidate Reagan was clearly not a direct vote for Mr. Reynolds, it was an implicit endorsement for policies so effectively advocated and implemented by the Reagan team of which Mr. Reynolds is a leading player.

It is regrettable that politicization of the confirmation process and partisan philosophy disputes have detracted from the real issues: Is Mr. Reynolds qualified to be Associate Attorney General? The President thinks he is. The U.S. Chamber agrees. And any objective analysis of Mr. Reynolds' experience and credentials can reach no other conclusion.

I would also like to comment on the basis of the business community's support for Mr. Reynolds.

Beyond our belief that Mr. Reynolds is qualified for this appointment, and the deference should be given to qualified choices of the

President, the U.S. Chamber also supports Mr. Reynolds because of his policies regarding several issues of importance to the business community.

For example, Mr. Reynolds has made impressive contributions to the debate over whether the *Grove City* decision is appropriate. In *Grove City* and other issues of major concern to the U.S. Chamber, Mr. Reynolds has provided Congress with thoughtful, well-reasoned, and well-researched background and argumentation.

He has also been an articulate spokesman in defense of the principles of federalism and limited government. He continually has demonstrated an appropriate concern about regulatory abuse and overreach and the harm they can cause to the economy in general and the business community in particular.

In the last 4 years under Mr. Reynolds' leadership, the Civil Rights Division's programs and policies have had a positive and widespread impact in the private sector and have been significant not only in restoring equity and balance to our civil rights laws, but also increasing the revitalization of the business community.

In conclusion, I would like to say that the U.S. Chamber of Commerce supports Mr. Reynolds' appointment as Associate Attorney General of the United States. Mr. Reynolds should be confirmed for two primary reasons: he is eminently qualified for the position, and he is the choice of the President.

The U.S. Chamber respectfully urges the Committee on the Judiciary and the U.S. Senate to confirm the appointment of William Bradford Reynolds.

Senator SIMON. I thank you. I have been advised by counsel—and forgive me, a new member—that we are to swear in our witnesses. And if you will stand and raise your right arm.

Do you swear that the testimony you will give in this matter will be the truth, the whole truth, and nothing but the truth?

Mr. DE BERNARDO. I do.

Mr. RAPPS. I do.

[The statement of Mr. de Bernardo follows:]

STATEMENT
on
THE CONFIRMATION OF WILLIAM BRADFORD REYNOLDS
as the
ASSOCIATE ATTORNEY GENERAL OF THE UNITED STATES
before the
SENATE COMMITTEE ON THE JUDICIARY
for the
CHAMBER OF COMMERCE OF THE UNITED STATES
by
Mark A. de Bernardo
June 5, 1985

I. STATEMENT OF INTEREST

I am Mark A. de Bernardo, Manager of Labor Law for the Chamber of Commerce of the United States. Accompanying me today is Virginia B. Lamp, Labor Relations Attorney for the U.S. Chamber.

We are pleased to have this opportunity to appear before the Committee on the Judiciary and express our full and unqualified support for the appointment of William Bradford Reynolds as Associate Attorney General of the United States. The U.S. Chamber respectfully urges this Committee to report favorably Mr. Reynolds' nomination.

II. THE QUALIFICATIONS OF MR. REYNOLDS FOR ASSOCIATE ATTORNEY GENERAL

A close examination of the experience and professional and academic credentials of Mr. Reynolds demonstrates that he is a highly qualified individual and a most appropriate appointment as Associate Attorney General of the United States.

Mr. Reynolds' nearly 20 years of experience in both the public and private sectors in responsible, senior positions make him particularly well-suited for this appointment. His service in the federal government in three capacities at different stages of his legal career gives him experience in and perspective on the appropriate role of government and both the policymaking and enforcement processes. His extensive experience before the U.S. Supreme Court presenting oral arguments and writing briefs gives him a deep understanding of and appreciation for our laws and legal system. Combined with his outstanding academic record at Yale University and the Vanderbilt University School of Law, Mr. Reynolds' background shows a wealth of experience which serves him well in his current position and would continue to be valuable as Associate Attorney General.

In his current position as Assistant Attorney General for the Civil Rights Division, Mr. Reynolds has distinguished himself in a difficult job for nearly four years. He has proven to be highly professional, knowledgeable, and effective in the performance of his duties. Based on this performance, Mr. Reynolds' legal skills as an attorney and administrative abilities as a manager are beyond question.

As Assistant Attorney General for the Civil Rights Division of the Department of Justice, Mr. Reynolds manages 390 employees, including 175 attorneys, and a budget of more than $19 million. He heads the chief agency for enforcement of federal civil rights laws, a agency which has grown steadily in work force, budget, and aggregate work years. Such experience, although not unique, is uncommon. This administrative experience provides one more major qualification supporting Mr. Reynolds' appointment.

This managerial experience also will be particularly helpful to Mr. Reynolds in his added responsibilities as Associate Attorney General. Overseeing Department of Justice areas of jurisdiction, such as tax and antitrust, requires the leadership that Mr. Reynolds can provide. This is particularly important to the business community because substantial reform has been achieved in these areas in recent years, reforms of which the U.S. Chamber supports and urges continuation.

Also beyond question is Mr. Reynolds' dedication to the Reagan Administration. Mr. Reynolds has made valuable contributions to the Administration in the past and has been an asset to the Department of Justice and a credit to the President.

III. CRITICS' MISUNDERSTANDING OF MR. REYNOLDS' CURRENT RESPONSIBILITIES

To a large extent, the criticisms of Mr. Reynolds' performance as Assistant Attorney General for the Civil Rights Division are not criticisms of Mr. Reynolds. These criticisms are (1) political attacks on the regulatory priorities and philosophies of the Reagan Administration in general and (2) legal disagreements with the constitutional law of our country as interpreted by the U.S. Supreme Court, especially in such cases as Firefighters Local Union No. 1794 v. Stotts.[1/]

Mr. Reynolds' effectiveness in implementing the Reagan Administration's policies and in adhering to Court decisions, such as Stotts, further antagonizes his opponents. However, these are precisely what his responsibilities are -- to implement Administration policies and to enforce the law as interpreted by the courts. Not to do so would have been a serious compromise of his office.

IV. POLITICS AND THE PRESIDENTIAL APPOINTMENT PROCESS

It is regrettable that some opponents would use the confirmation process and these hearings as a forum to attack the Administration and its policies or to protest in frustration recent legal interpretations by the courts of our civil rights and responsibilities.

[1/] __ U.S. __, 52 U.S. Law Week 4767 (1984).

Qualified individuals, such as Mr. Reynolds, should not be denied Presidential appointments simply because of opponents' disagreement with Administration policies.

This Administration, like all administrations in our form of government, was elected by the popular vote of the people. It is not only the Presidential prerogative, but also the Presidential *mandate* to appoint appropriate individuals who will carry out his campaign goals and promises. The Reagan Administration was elected overwhelmingly with majorities in 49 states whose mandate was four more years of the policies and philosophies of President Reagan as typified by Mr. Reynolds' performance as Assistant Attorney General. Although a vote for candidate Reagan clearly was *not* a direct vote for Mr. Reynolds, it *was* an implicit endorsement of the policies so effectively advocated and implemented by the Reagan team, of which Mr. Reynolds is a leading player.

It is regrettable that politicization of the confirmation process and partisan policy disputes are detracting to an extent from the real issue: *Is Mr. Reynolds qualified* to be Associate Attorney General? The President thinks he is. The U.S. Chamber agrees. And any objective analysis of Mr. Reynolds' experience and credentials can reach no other conclusion.

V. THE BASIS OF THE BUSINESS COMMUNITY'S SUPPORT FOR MR. REYNOLDS

Beyond our belief that Mr. Reynolds is qualified for this appointment and that deference should be given to qualified choices of the President, the U.S. Chamber also supports Mr. Reynolds' appointment because of his policies regarding several issues of importance to the business community.

For example, Mr. Reynolds has made impressive contributions to the debate over what legislative response to the Supreme Court's *Grove City College v. Bell*[2] decision is appropriate. On *Grove City* and other issues of major concern to the U.S. Chamber, Mr. Reynolds has provided Congress with thoughtful, well-reasoned and well-researched background and argumentation.

Mr. Reynolds also has been an articulate spokesman in defense of the principles of federalism and limited government. He continually has demonstrated an appropriate concern about regulatory abuse and overreach and the harm they can cause to the economy in general and the business community in particular.

In the last four years under Mr. Reynolds' leadership, the Civil Rights Division's programs and policies have had a positive and widespread impact in the private sector and have been significant not only in restoring equity and balance to our civil rights laws but also in increasing the revitalization of the business community.

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[2] 104 S. Ct. 1211 (1984).

VI. CONCLUSION

The U.S. Chamber of Commerce strongly supports the appointment of William Bradford Reynolds as Associate Attorney General of the United States. Mr. Reynolds should be confirmed for two primary reasons: (1) he is eminently qualified for the position; (2) he is the choice of the President.

The U.S. Chamber respectfully urges the Committee on the Judiciary and the U.S. Senate to confirm the appointment of William Bradford Reynolds.

Senator SIMON. We will hear from our second witness.

STATEMENT OF DENNIS RAPPS

Mr. RAPPS. Good afternoon. My name is Dennis Rapps, and I am the executive director and general counsel of the National Jewish Commission on Law and Public Affairs. COLPA is a national volunteer membership organization of lawyers and social scientists who advocate the constitutional and legal rights for religious minorities in courts and before other governmental bodies.

COLPA has represented individuals pro bono publico in administrative and legal proceedings involving the exercise of religious liberties, and it has filed amicus curiae briefs in most of the major freedom of religion case heard by the Supreme Court of the United States since the mid-1960's.

I appear here today to share with the members of the committee some of COLPA's experiences with William Bradford Reynolds in connection with the committee's consideration of the nomination of Mr. Reynolds as Associate Attorney General.

The principal work of COLPA has been directed toward facilitating reasonable accommodation of the religious-based needs of members of minority faiths when those needs conflict with prevailing societal and economic practices. One illustrative example of such a conflict is when regular work schedules require work on an employee's Sabbath and the tenets of the employee's faith prohibits such work.

COLPA through its national vice president, Nathan Newin, a Washington attorney, is currently representing the petitioner in the estate of Donald E. Thornton in a case now pending before the United States Supreme Court. The principal issue in this case is whether a Connecticut statute that provides legal protection for those of us who must absent themselves from their jobs on their Sabbaths as a matter of religious observance is permitted by the first amendment's prohibition against the establishment of religion.

The Supreme Court of Connecticut viewed this important legal protection for minority rights as, quote unquote, an "establishment of religion" and held the law unconstitutional. The Connecticut court said that the statute had religious overtones because it confirmed a, quote unquote, "benefit" on an explicitly religious basis.

I cannot emphasize enough the critical importance to religious freedom for Sabbath observers not to have to choose between their religions and their jobs. That is, as Justice Potter Stewart once said a, quote unquote, "Cruel choice" between religious faith and economic survival, a choice that should not be demanded in our society.

The Civil Rights Division headed by Mr. Reynolds supported our efforts to secure the U.S. Supreme Court in view of the Connecticut court decision, not only to accommodation in employment but also to all efforts to secure the rights of religious minorities. The Justice Department through the Civil Rights Division headed by Mr. Reynolds, submitted an amicus curiae brief in support of our petition for certiorari to bring the matter before the court, and subsequently filed a strong amicus curiae brief on the merits.

The Justice Department's brief demonstrated a deep sensitivity to the need to protect individuals who are otherwise defenseless against discrimination. As representatives of a religious minority that has often been the target of bigotry and discrimination, we could have received no finer support from anyone than we received from Mr. Reynolds.

There is another area where we find Mr. Reynold's position to be generally compatible with our own and sound public policy. That area is the broad one known as affirmative action.

So that there can be no ambiguity, let me emphatically state that COLPA is firmly committed to the rights of all Americans to live free from invidious discrimination based on race or national origin. But we impose with equal vigor any action to redress such discrimination in a way that penalizes those who are not the perpetrators of discrimination and rewards those who are not its victims. Mr. Reynolds has generally espoused this approach and has been criticized widely as a result. He does not deserve that criticism.

Many people including myself who are members of a religious minority believe that government must prohibit discrimination. But we believe equally that it is not the business of Government to discriminate against the innocent. Government action must guarantee equal access to employment, housing, and other opportunties, and permit individual merit to prevail. But it is not the role of government to favor one group in society over another.

I would like to make one final point. Mr. Reynolds, and indeed the entire present administration has been condemned by many for their role in the so-called *Grove City* problem. We do not share in this criticism. Opposition to sweeping legislation in this area of the law is not tantamount to support for invidious discrimination. As a member of a minority religion, which for centuries has maintained separate facilities for males and females in worship and education, we join Mr. Reynolds in supporting the approach as contained in the Dole amendment rather than the broader approach adopted in the current House measure. We favor legal recognition of the legal rights of women, but we are concerned that under the House bill the legitimate rights of religious practice would be jeopardized.

In sum, we report to you that in the area of our principal concern, for protection of minorities' religious practices, Mr. Reynolds has shown himself to be a vigorous protector of civil rights. In the area of affirmative action and the *Grove City* problem, he has pursued courses that have been widely criticized but are to our view correct.

We believe that the goal of equal rights for all has had a dedicated advocate in William Bradford Reynolds. Thank you very much.

[Statement follows:]

STATEMENT

OF

DENNIS RAPPS
EXECUTIVE DIRECTOR
NATIONAL JEWISH COMMISSION
ON LAW AND PUBLIC AFFAIRS
(COLPA)

Good afternoon.

My name is Dennis Rapps and I am the Executive Director of the National Jewish Commission on Law and Public Affairs, generally known as COLPA. COLPA is a national volunteer membership organization of lawyers and social scientists who advocate the constitutional and legal rights of religious minorities -- particularly observant Jews -- in courts and before other governmental ~~abides~~ bodies. COLPA has represented individuals pro bono publico in administrative and legal proceedings involving the exercise of religious liberties, and it has filed amicus curiae briefs in most of the major freedom-of-religion cases heard by the Supreme Court of the United States since the mid-1960's.

I appear here today to share with the members of the Committee some of COLPA's experiences with William Bradford Reynolds in connection with the committee's consideration of the nomination of Mr. Reynolds as Associate Attorney General. But first, some explanatory words about COLPA.

The principal work of COLPA has been directed towards facilitating reasonable accommodation of the religious-based needs of members of minority faiths when those needs conflict with prevailing societal and economic practices.

One illustrative example of such a conflict is when regular work schedules require work on an employee's Sabbath and the tenets of the employee's faith prohibit such work. Another example is the possible conflict between the public policy prohibiting discrimination based on gender and a long-standing practice of certain faiths which provide for the separation of the sexes, based on religious tenets, in worship and educational facilities. Still another is the conflict between state public health laws requiring autopsies even in circumstances when they are prohibited by the tenets of the faith of the deceased. Other examples involve religious rights in the areas of employment, taxation, family law, military service, education, prisons and zoning law.

We believe that reasonable accommodation of religious practices of minorities in our pluralistic society is the philosophical bedrock underlying our political and civil liberties. We further believe, based on our recent dealings with the Civil Rights Division, that Mr. Reynolds shares our view of the free exercise values protected by the First Amendment and of the importance of preserving and protecting the liberties of religious minorities.

COLPA, though its national Vice President, Nathan Lewin, is currently representing the Estate of Donald E. Thornton in a case now pending before the United States Supreme Court. The principal issue in that case is whether a Connecticut statute the provides legal protection for those who must absent themselves from their jobs on their Sabbaths as a matter of religious observance is permitted by the First Amendment's prohibition against the establishment of religion. The Supreme Court of Connecticut viewed this important legal protection for minority rights as an "establishment of religion" and held the law unconstitutional. The Connecticut court said that the statute had "religious overtones" because it conferred a "benefit" on an explicitly religious basis.

I cannot emphasize enough the critical importance to religious freedom for Sabbath-observers not to have to choose between their religions and their jobs. That is, as Justice Potter Stewart said, a "cruel choice" between "religious faith" and "economic survival" -- a choice that should not be demanded in our pluralistic and free society.

The Civil Rights Division, headed by Mr. Reynolds, supported our efforts to secure United States Supreme Court review of the Connecticut court's decision -- which clearly is antithetical not only to accommodation in employment but also to all efforts to secure the rights of religious minorities. The Justice Department, through the Civil Rights Division headed by

Mr. Reynolds, submitted an _amicus curiae_ brief in support of our petition for _certiorari_ to bring the matter before the Court, and it subsequently filed a strong _amicus curiae_ brief on the merits. The Justice Department's brief demonstrated a deep sensitivity to the need to protect individuals who are otherwise defenseless against discrimination. As representatives of a religious minority that has often been the target of bigotry and discrimination, we could have received no finer support from anyone than we received from Mr. Reynolds.

The Civil Rights Division's solicitude and concern for minorities contrasts sharply, I might add, with the insensitive response we have received from another division of the Department of Justice -- the Civil Division -- in another case involving the rights of religious minorities. Some of you may have read or learned in the course of considering the Defense Appropriations Act of our battle to secure the rights of Orthodox Jewish members of the military service to wear virtually unobtrusive skullcaps -- called _yarmulkes_ -- while they are on duty. The Civil Division has fought this minimal accommodation to religious practice tooth and nail in our litigation, and, because of those efforts, the Court of Appeals for the District of Columbia Circuit has held that an Air Force psychologist has no legal right to wear a _yarmulke_. We believe that if the attitude of the Civil Rights Division, as headed by Mr. Reynolds, governed that litigation, the Justice Department's position would have been different. And we hope that if he assumes the position of Associate Attorney General, he will bring to cases of that kind -- and to the _Goldman_ case itself -- the same understanding and sensitivity that has marked the Civil Rights Division's attitude towards Sabbath-observers.

There is another area where we find Mr. Reynolds' position to be generally compatible with our own and with what where we believe is sound public policy. That area is the broad one known as "affirmative action." So that there be no ambiguity, let me emphatically state that COLPA is firmly committed to the rights of all Americans to live free from invidious discrimination based on race or national origin. But we oppose, with equal vigor, any action to redress such discrimination in a way that penalizes those who are not the perpetrators of discrimination and rewards those who are not its victims. Mr. Reynolds has generally espoused this approach and has been widely criticized as a result. He does not deserve that criticism. Many people, including myself, who are members of a religious minority believe that government must prohibit discrimination. But we believe equally that it is not the business of government to discriminate against the innocent. Government action must guarantee equal access to employment, housing and other opportunities and permit individual merit to prevail. But it is not the role of government to favor one group in society over another.

I would like to make one final point. Mr. Reynolds, and indeed the entire present Administration, has been condemned by many for their role in the so-called Grove City problem. We do not share this criticism. Opposition to sweeping legislation in this area of the law is not tantamount to support for invidious discrimination. As a member of a minority religion, which, for centuries, has maintained separate facilities for males and females in worship and education program, we join Mr. Reynolds in supporting the approach of the Dole Amendment, rather than the broader House measure. We favor legal recognition of the legal rights of women, but we are concerned that under the House bill, the legitimate rights of religious practice would be jeopardized.

In sum, we report to you that in the area of our principal concern -- protection of minorities' religious practices -- Mr. Reynolds has shown himself to be a vigorous protector of civil rights. In the areas of affirmative action and the Grove City problem, he has pursued courses that have been widely criticized but are, to our view, correct. We believe that the goal of equal rights for all has had a dedicated advocate in William Bradford Reynolds.

Thank you very much.

Senator SIMON. We thank you very very much for your testimony. The committee may be submitting some questions to you. And if you can respond promptly to those questions, we would appreciate it. We thank you for your testimony.

Mr. RAPPS. May I just note that I handed up a copy of my full remarks.

Senator SIMON. The full statements of the two of you and all witnesses will be entered into the record.

Mr. RAPPS. Thank you very much.

Senator SIMON. The next panel will be William Quigley, Lani Guinier, Frank Parker, Robert Dinerstein, Marianne Becker, Mrs. Foster, and John England.

The witnesses will rise and raise your right hand.

Do you swear that the testimony that you will give in this matter will be the truth, the whole truth, and nothing but the truth, so help you God?

[The witnesses replied in the affirmative.]

Senator SIMON. Are Mrs. Foster and John England here?

Mr. Quigley, we will hear from you first.

TESTIMONY OF THE PANEL CONSISTING OF WILLIAM QUIGLEY, ATTORNEY, NEW ORLEANS, LA; FRANK R. PARKER, LAWYERS COMMITTEE FOR CIVIL RIGHTS UNDER LAW, WASHINGTON, DC; LANI GUINIER, NAACP LEGAL DEFENSE AND EDUCATION FUND, WASHINGTON, DC; ROBERT D. DINERSTEIN, CLINICAL LECTURER AND ACTING DIRECTOR, CRIMINAL JUSTICE CLINIC, AMERICAN UNIVERSITY COLLEGE OF LAW, WASHINGTON, DC; MARIANNE BECKER, FORMER HOMEWARD BOUND PRESIDENT; JOHN ENGLAND, ATTORNEY, GREENE COUNTY, AL; AND MARIE FOSTER, SELMA, AL

Mr. QUIGLEY. Thank you. My name is Bill Quigley, and I am an attorney in private practice in New Orleans, LA.

And I am here to speak about the *Major* v. *Treen* case. I was the attorney who submitted the objections to the Justice Department. Also, I, along with Ms. Lani Guinier and several other lawyers in New Orleans, litigated the case.

There are a couple of things that have been said yesterday and today by Mr. Reynolds that are just factually incorrect and I think need to be cleared up from the beginning.

The first one is that Mr. Reynolds said that the Nunez plan, which was discussed at some length, was drawn to maximize a black political district. In fact, in Louisiana the creation of the first black majority district was just a byproduct of an action by suburban whites who wanted to create their own congressional district.

Jefferson Parish is the suburb community of New Orleans, and they are 80 percent of the ideal congressional district. And they wanted to have all of their parish in one district. The plan was authorized by white suburban legislators. It went by the books, it went through the legislative process, and was passed by both houses of the legislature.

This plan statewide only cut up four parishes where act 20, the one approved by Mr. Reynolds, cut up seven parishes. Ms. Guinier has a map that we'd like to refer to just briefly that is a larger map of the way that the plan that was approved by Mr. Reynolds was actually—how it actually looked and what it did to the inner city of New Orleans and to surrounding parishes.

From this point on (indicating) is Orleans Parish, which is a predominantly black district, which makes up 1.06 percent of the ideal congressional district. From this part outward is an 85-percent white area that makes up 87 percent of the ideal congressional district.

The Nunez plan put this area, the predominantly white 87 percent, in one area and put the city of New Orleans in another area, and created a black majority district. It was not authorized by or sponsored by black legislators, but that is what happened.

When the Governor threatened to veto it, you can see what happened. This contorted ducklike figure was created basically precinct by precinct by people in the basement of the capitol, who were in violation of the State's public meeting laws, with people shuttling upstairs and down going over the individual shape and the individual makeup of the district to make sure that it was approved by the Governor.

There are 41 turns in this. They go through 31 majority black precincts. Out of these 31 black precincts 14 were put in the yellow area, 17 were put in the blue area. So it was very clearly and cleanly cut up.

The black population of New Orleans was, instead of the black majority district in the Nunez plan, made two black minority districts.

Mr. Reynolds also made the statement that this was a political gerrymander and not a racial gerrymander. But in fact in Louisiana race is part of politics. And it may have well been a political gerrymander, but it was certainly racial as well.

Another factual misstatement that was made by Reynolds was that Ms. Boggs played a role in expressing some concern about the black majority district. Her office has continually, and she personally, said that she can live with anything that the legislature comes up with and she felt was fair. And she has kept that position consistently. And the attempt this morning by Mr. Reynolds to try to bring her into it as some sort of shield for his action is inaccurate and unfair.

The third inaccuracy is that Mr. Reynolds said repeatedly that this was not a one-sided thing, that he met with the Governor several times of Louisiana. And I think the records that Ms. Guinier may show showed that he spoke with him on the phone more than a dozen times.

He did say he met with us as well. I was the lawyer for the people objecting. Neither I nor any of the people that objected were ever allowed to meet with Mr. Reynolds.

We understood that actually we had the burden of proof in this matter, and even though the law said otherwise. And we asked repeatedly for the opportunity to be able to meet with him. And that was denied to us.

Senator SIMON. We are getting to the end. Conclude please.

Mr. QUIGLEY. The only point that I would like to say is certainly Mr. Reynolds is articulate and intelligent. But at least from our perspective he is on the wrong side for this job, and that in Louisiana history there have been other people like Mr. Reynolds. But it makes us wonder in Louisiana that if Leander Perez had gone to a finishing school and had the opportunity to go to Yale Law School, what kind of promotions would be available for him as well.

Senator SIMON. The last two witnesses were not here when the others were sworn in. If you do not mind please stand and raise your right hand.

Do you swear that the testimony you will give will be the truth, the whole truth, and nothing but the truth so help you God?

Mr. ENGLAND. I do.

Ms. GUINIER. I do.

Senator SIMON. And if you can state your names as you testify for the record so the court reporter can get that. Lani Guinier is our next witness.

STATEMENT OF LANI GUINIER

Ms. GUINIER. My name is Lani Guinier. I was assistant to Drews Day when he was Mr. Reynolds' predecessor. I am now assistant counsel to the NAACP Legal Defense Fund.

As Mr. Quigley has testified, he and I with a number of other lawyers litigated the *Major* v. *Treen* case. We are here today to answer any questions that the Senators may have about this particular case and to respond in particular to the assertions that Mr. Reynolds made yesterday and today that are inaccurate, misleading, and half true.

In the section 5 preclearance process which Mr. Quigley was responsible for handling on behalf of black voters in Louisiana, Mr. Reynolds has the responsibility of acting both as judge and as prosecutor. As a prosecutor he failed to fully investigate the facts. As the judge he only listened to one side. As Mr. Quigley has told you, he only met with the Governor and representatives of the Governor.

I have Mr. Reynolds' meeting logs and I have his meeting notes that were furnished to me as part of the discovery process in the *Major* v. *Treen* case. I am attaching those logs and those notes to my testimony and ask that they be made part of the record.

Senator SIMON. They will be entered in the record.

Ms. GUINIER. In addition, I have Mr. Reynolds' telephone logs, which indicate that he had at least nine telephone conversations with David Treen, the Governor of Louisiana, and no telephone conversations with any of the opponents to Act 20.

Senator Biden has asked Mr. Reynolds about several requests for more information that were made pursuant to the section 5 preclearance review process. These requests for more information are routine requests that are normally sent out by the staff of the section 5 unit of the Department of Justice.

In a highly unusual move Mr. Reynolds recalled the first request for more information and sent out a second request. His explanation yesterday of his recalling the first request and sending out a second was first that there was a problem with the tone of the first request. When asked by Senator Biden what was the problem with the first request and given an opportunity to review that particular document, he then amended his explanation and said that the first request, which asked specifically about statements that the Governor had made, was too pointed, and he did not as the prosecutor want to ask for exactly what he needed, he wanted to broaden the inquiry.

I would recommend for every Senator to compare those two documents: that is the February 2 request for more information and the February 16 request for more information, paragraph 10. I am also attaching those to my statement and would ask that that be part of the record.

Senator SIMON. They will be entered in the record.

Ms. GUINIER. Third, Mr. Reynolds on June 18 made his decision to overrule the recommendation of his staff to preclear act 20. He made the decision and stated that the particular plan in question had neither a discriminatory purpose nor a discriminatory effect. He said in his June 18 memo that he had found no evidence of discriminatory purpose on the part of either the Governor or the legislators.

His statement was unambiguous. He had found no evidence of discriminatory purpose. This is despite the fact that he acknowledged in testimony both yesterday and today that he had statements from members of the legislature with whom he had personally met on May 31, 1982, statements that they did not want another nigger bigshot out of New Orleans, they already had one nigger mayor.

In addition, he knew about the secret meeting that the legislature had. He claimed that that was not probative because the Governor personally was not present. In fact, representatives of the Governor were present at that meeting and people were coming in and out of that meeting and constantly carrying back information to the Governor. The only people who were not present at that meeting who were deliberately excluded were members of the legislature who were black.

In addition, as I indicated, he said that there was no evidence of the Governor's intent to discriminate. This is despite the fact that he had before him evidence that the Governor deliberately set a ceiling on the number of blacks he found acceptable in any district in Louisiana of 44.7 percent. Under no circumstances did he want to see a district with a majority of blacks in it. He has admitted that, and he said that in statements that were presented to Mr. Reynolds for his review under section 5.

Senator SIMON. If you can conclude your testimony. I hate to say it, but we are running into time problems.

Ms. GUINIER. OK. I would like to say that Senator Mathias expressed concern about the fact that Mr. Reynolds was not acting aggressively as an advocate for the unrepresented and the victims of discrimination.

My concern goes beyond that. My concern is that Mr. Reynolds is not enforcing the law. And I would urge the committee not to confirm him for a higher office. Thank you. And I'd be happy to answer any questions.

[Information follows:]

TESTIMONY OF

LANI GUINIER, ESQUIRE

NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

CONFIRMATION HEARINGS ON WILLIAM BRADFORD REYNOLDS

JUNE 5, 1985

My name is Lani Guinier. I am Assistant Counsel, NAACP Legal Defense and Educational Fund. I litigate almost exclusively in the voting rights area. I had substantial responsibility for litigating two of the most significant statewide reapportionment cases interpreting Section 2 of the Voting Rights Act, as amended in 1982: Major v. Treen, 574 F.Supp. 325 (E.D. La. 1983) (three judge court) (the "Donald Duck" Congressional gerrymander) and Gingles v. Edmisten, 590 F.Supp. 345 (E.D.N.C. (1984), probable jurisdiction noted, April 29, 1985. Both of these three-judge court cases involved successful challenges by black plaintiffs to discriminatory districting plans that were approved via preclearance under Section 5 by William Bradford Reynolds, Assistant Attorney General, United States Department of Justice. I am co-author, with Drew S. Days, III, of a chapter on enforcement of Section 5 of the Voting Rights Act in the book, Minority Vote Dilution (Howard University Press, 1984). From 1977-1981, I was Special Assistant to Mr. Days when he was Assistant Attorney General for Civil Rights. I submit this testimony on behalf of the Legal Defense Fund.

A report issued by the Leadership Conference on Civil Rights three years ago reviews the record of civil rights enforcement under William Bradford Reynolds and concludes "the Reagan Administration's Justice Department has permitted political considerations to corrupt fair administration of the law."

The Report then recites a litany of examples of intervention by Republican politicians to successfully circumvent the Department of Justice channels normally relied upon for fair decision making. I cite here three of the examples which involve voting rights cases handled by the Civil Rights Division (LCCR Report, at 68-69):

> -- After talking to Senator Strom Thurmond (R-S.C.) about the case, Assistant Attorney General Reynolds reversed himself and decided not to join in a voting rights enforcement suit in Edgefield County, South Carolina -- Strom Thurmond's childhood home. [This is after the brief had been prepared by the staff of the Voting Section and sent for filing to the United States Attorney Office.]
>
> -- After Republican Senator Thad Cochran and Congressman Trent Lott of Mississippi protested a longstanding Department objection to an annexation of white voters by the City of Jackson, the objection was revoked peremptorily. Senator Cochran, brother of a member of the Jackson City Council, acknowledged that he had "asked the high echelon people to take a look at the Jackson problem."
>
> -- When the Justice Department filed a complaint in an important voting rights case alleging a history of official action to maintain "white supremacy" in Mobile, Alabama, Senator Jeremiah Denton protested vigorously. The Attorney General responded by directing the filing of an amended complaint deleting the phrase. Veteran lawyers could not recall another instance when a complaint already filed was changed to accommodate a political protest.

Those three cases are not isolated. I would like to talk about a case that William Quigley and I litigated in 1983 in New Orleans, Louisiana: _Major_ v. _Treen_.

Reapportionment of Congressional districts by the Louisiana Legislature is mandated by Article I, § 2 of the United States Constitution and Art. III, § 1 of the Louisiana Constitution of 1974.

As a result of the 1980 census, the State had to reapportion its Congressional districts. The State of Louisiana has eight Congressional districts. The size of the ideal Congressional district under the 1970 Census was 455,580 persons and under the 1980 Census, the figure rose to 525,497 persons.

The Louisiana Legislature recognized in early 1981 that there was a need for Congressional reapportionment and began its proceedings to undertake this legislative responsibility.[1]

A. The Reapportionment Process[2]

The formal reapportionment process began in mid-July 1981 at the close of the regular 1981 legislative session with the appointment of the members of the Congressional reapportionment subcommittees in both houses of the legislature. No blacks served as members of either subcommittee.

At the initial meetings of the Congressional reapportionment subcommittees, held on July 23, 1981, and August 21, 1981 rules for Congressional reapportionment were adopted, including a rule to avoid dilution of minority voting strength.[3]

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[1] Under state law, legislative reapportionment is primarily the obligation of the Louisiana Legislature, but if that legislative task is not completed by December 31, 1981, the last day in the year after the latest federal decennial census, the reapportionment obligation devolves to the Louisiana Supreme Court. Louisiana Constitution, Art. III, § 6(B).

[2] The process is described in greater detail in Robert Kwan's Section 5 Submission Analysis at 3-10.

Hearings of the Congressional reapportionment subcommittees were conducted from July through October 1981. Various proposals were presented, including those of the Louisiana Congressional delegation and, on October 22, of Governor David Treen. The possibility of drawing a majority black district based in Orleans Parish was brought out "very early on in the public hearings" and the legislative staff was "directed quite early on to come up with such a proposal." All of Governor Treen's three proposals, however, divided the New Orleans black population concentration and none of the Governor Treen's plans contained a majority black population district. During this period the Governor made known his opposition to congressional reapportionment plans containing majority black population districts.

On November 2, 1981, the First Extraordinary Session of the Louisiana Legislature of 1981 convened. Senate Bill 5 (the Nunez Plan) was introduced in the Senate. The Nunez Plan provided for a Jefferson Parish based district (District 1) and an Orleans Parish based district (District 2), that was 54% black in population. The Nunez Plan was a staff generated plan which Senator Samuel B. Nunez, Jr. subsequently adopted. The plan was drafted to follow neutral redistricting criteria and to address issues that were raised at the public hearings.

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[3] At the July 23 meeting, the members were also advised by staff attorneys of the dangers of "discriminatorily altering access to the voting process", of "carving up predominantly black neighborhoods to make it impossible to elect a black."

On the House side, Representative John W. Scott introduced House Bill 2 (the Scott Plan) which had a 50.2% black majority population district in the Second Congressional District. Both the Nunez Plan and the Scott Plan had majority black districts and were the only plans seriously considered by the legislature prior to November 6.

By November 6, both houses of the legislature had adopted Congressional reapportionment bills incorporating the Nunez Plan, with a majority black population district in District 2. At this point, Governor Treen issued a public statement that "any bill in that form is unacceptable and without question will be vetoed." The Times-Picayune, November 7, 1981, p. 1. The threat of a veto killed the Nunez Plan, and eliminated any opportunity for passing a plan with a majority black congressional district. The Nunez Plan had passed both Houses by a comfortable margin, but not by enough to override a veto. No gubernatorial veto has ever been overridden by the Louisiana Legislature and the threat to veto was as powerful an instrument as actually vetoing the bill because the legislature was concerned about enacting some form of reapportionment within the Special Session. (_Id._) _See_ note 1, _supra_.

After news of the threatened veto reached the legislature, and in response to heavy lobbying by the Governor and his aides, on November 9, the House reversed its earlier position and adopted an amendment to incorporate the Governor's Reconciliation Plan presented only hours earlier. This action necessitated appointment of a conference committee since the Senate rejected the new House amendments.

Appointment of the conference committee was delayed until a compromise acceptable to the Governor was reached in a private session that took place in the sub-basement of the State Capitol. The delay was necessary to avoid compliance with the Louisiana Open Meetings Law, L.S.A.R.S. 42:2.1 et seq. which requires notice and access to the public for formal meetings.

The actual work of hammering out a settlement took place in a private meeting in the Senate Computer Room in the sub-basement of the State Capitol. Although the group met for several hours with participants coming in and out, no black legislators were invited and no representatives of the black community were consulted by any of the people involved in negotiating a compromise plan. Representatives were present of all interested parties, except blacks. Blacks were deliberately excluded from the negotiations because, in light of the Governor's position, the persons involved in the private meetings had no intention of considering the interests of black voters or of drawing a district that did not fragment the concentration of black voters in New Orleans.

The guidelines followed in the sub-basement meeting were to draw the Second Congressional District with a population majority in Jefferson Parish and with a black population that was more than 40% but less than 45% of the district. The 45% black population ceiling was dictated by the demographics of the area and the Governor's position that a majority black district was unacceptable.

Act 20 was drawn in the sub-basement meeting and was approved by Governor Treen, who had stayed late at night to review it. Governor Treen had no concern, when he first reviewed Act 20, or at any time thereafter, that the Plan carved up the black community in New Orleans without regard to political, historical or natural boundaries. After the Governor noted his approval, a formal conference committee was appointed on Wednesday, November 11. No black legislators were named to the conference committee.

When the conference committee held its public meeting, several black legislators delivered impassioned speeches against the so-called compromise. Conference committee members, legislative staff and witnesses perceived the purpose and the result of the new plan as the "(elimination of) the existence of a black district from the plan." Representative Scott proposed amendments to add back a majority black district based in New Orleans, but those amendments were rejected.

On November 12, the last day of the special session, both the full House and Senate passed the conference committee plan. Governor Treen signed the bill into law on November 19, 1981 as "Act 20 of the First Extraordinary Session of 1981."

In the City of New Orleans there exists the largest concentration of blacks living in the State of Louisiana and in the New Orleans metropolitan area. According to the 1980 census, the Parish of Orleans, coterminous with the City, has a total population of 557,482 persons, of whom 55%, or 308,039, are black.

Act 20, unlike all of the congressional reapportionment plans seriously considered by the legislature prior to the Governor's threat to veto the Nunez Plan, does not respect the integrity of the Orleans Parish black concentration. Employing contorted lines, Act 20 divides the concentration into two Congressional Districts, so that black registered voters are a minority of the voters in each district. (38.7% black voters are placed in the Second District; 21.5% black voters are in the First District). The lines of Act 20 are most contorted when they cut through the heaviest black concentration in the Parish. The portion of the Second District that cuts into Orleans Parish makes 42 turns through 31 contiguous precincts with majority black populations, placing the half of the precincts which are 95% or more black in population in each district. Act 20, although variously called a seahorse, an ugly duckling and a dog, is most commonly referred to as the "Donald Duck Plan."

B. The Preclearance Process

Act 20, having passed the legislature over the vigorous opposition of the black members,[4] had to be submitted to the Department of Justice for preclearance review under Section 5 of the Voting Rights Act. The staff of the Civil Rights Division did their job, investigated, received over 100 letters and comments from blacks in Louisiana (not a single one favorable to Act 20) and recommended the interposition of an objection on the grounds that the plan was racially motivated. The staff recommendation went to Assistant Attorney General William Bradford Reynolds. During the time that the matter was under submission to the Department of Justice, Mr. Reynolds had met at least two times with Governor Treen whose role was pivotal in getting the State Legislature to pass Act 20.[5] In addition to their face to face meetings, Mr. Reynolds spoke with the Governor at least nine times on the telephone while Act 20 is being reviewed by the Division staff. During this time, Mr. Reynolds had no telephone conversation or meetings with any black legislator or black community leaders from the State of Louisiana about Act 20.

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[4] The Louisiana Legislative Black Caucus consisting of the two black senators and the ten black representatives unanimously opposed Act 20 as a dilution of minority voting strength and blame Governor

(footnote continued)

When the staff sends out a routine request for more information and specifically asks about several statements the Governor had made during the reapportionment process, Mr. Reynolds recalls

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footnote continued
Treen as the one chiefly responsible. Richard Turnley, Chair, Louisiana Legislative Black Caucus testified that the Governor was "opposed to having a district that would be predominantly black, where the opportunity would be available for a black person to be elected."

[5] The sequence of events in the reapportionment process indicates that the role of Governor Treen in the process, while central in the reversal of the legislature from its adoption of a plan which would incorporate a majority black Congressional district, was not exclusively responsible for the reversal. Racial considerations of individual legislators also played a significant role in the legislature's acquiescence to the Governor's refusal to support any plan with more than 44.7% black population in one district.

the letter. Although the Governor had publicly threatened to veto the previous plan that (a) respected the parish lines between Orleans and Jefferson Parish (b) respected the natural boundary of the Mississippi River (c) was more compact and (d) had a 54% black population district because most of Orleans was in one district, Mr. Reynolds recalled the letter asking for more information about the Governor's role in this process. He substituted another letter that failed to inquire about the Governor's role or his public statements in the Fall of 1981 that he was opposed to a black majority district. For example, the Governor had said that a majority black district "smacks of racism."

The Assistant Attorney General's failure to investigate fully the facts is significant. Both Houses of the State Legislature had passed a plan with a congressional district based in New Orleans with a 54% black population in one district. The Governor's threat to veto killed that plan because no veto of a Governor in Louisiana has ever been overriden by the Legislature. The Legislature went back to the drawing board, but now, in trying to meet the Governor's ceiling of black population (i.e., 45% black population in one district) they excluded all the black legislators from secret meetings that were held in the sub-basement of the Senate Capitol. As one witness for the defendants testified at trial, "the text book stuff went out the window."

Why was the Governor against a majority black district? First, the Governor is a former member of the State's Rights

Party in Louisiana (Central Chair in 1960). He lost several elections in the 1970's as a result of what he perceived to be "bloc voting by blacks." Moreover, Representative Robert Livingston, a friend of the Governor, in order to get reelected, needed enough white voters from the suburbs, according to testimony at trial "to take care of any problems dealing with inner city blacks."

On June 19, 1982, Assistant Attorney General Reynolds failed to interpose an objection pursuant to Section 5 of the Voting Rights Act. Despite the staff recommendation, Mr. Reynolds approved the plan, finding no evidence of racial intent on the part of the Governor or the legislature. His action was not only inconsistent with the analysis of the staff experts, it was also inconsistent with the Department of Justice regulations. The regulations provide [Section 51.39(e)] that if the evidence regarding racial purpose is conflicting, or if the Assistant Attorney General has any doubt, that doubt should be resolved by objecting. Mr. Reynolds' approval is also significant because of his strong position before the Senate when it was considering extension of the Voting Rights Act. Mr. Reynolds said, in opposing the results test in Section 2, that it is easy enough to prove discrimination using an intent test. In other fora as well, such as a letter to the editor of the Washington Post (Feb 1982), he opposed the results test amendment to the Voting Rights Act, which had passed the United States House of Representatives 389 to 24 and which made it easier to prove discrimination. He assured the readers that a results test was unwarranted because under an intent test a "smoking gun" in the form of incriminatory statements had never been required to prove discriminatory purpose. Well here he had incriminatory statements; he just failed to pursue them. He simply chose to ignore statements as "we don't need another nigger mayor," a reference to Ernest Morial made by a legislator who sat on the conference committee that approved Act 20, and who met with Mr. Reynolds while Act 20 was under submission to the Department of Justice.

I have yet to see evidence that the Assistant Attorney General reviewed Act 20 and made his decision in a manner that was reliable, trustworthy, or sufficiently adversarial to accord the conclusion of that process any credibility. In fact, the evidence tends to show that the professional staff and career experts in the Department investigated the facts and reached the conclusion that Act 20 was intentionally discriminatory, that the Department's effort to investigate the facts was thwarted when a routine request for more information was recalled, that all references in the initial request to statements made by the Governor regarding congressional reapportionment were removed although the Governor's role in threatening to veto the Nunez Plan was obviously relevant, and that Mr. Reynolds made his decision hearing only one side of the story, and never consulting any of the opponents to Act 20. The decision of the Assistant Attorney General with regard to Act 20 was the product of a non-adversary proceeding, was inconsistent with the recommendations of his staff, and was made in response to a concerted personal lobbying effort by the Governor of Louisiana.

This conclusion was foreshadowed by the Louisiana Legislative Council in a Memorandum, November 8, 1981, (P. Ex. 25 at 5), "a 44-46% black population district in a modification of one of the Governor's plans would likely receive favorable treatment in Reagan's Department of Justice if the plan were perceived as aiding the retention and election of Republican Representatives."

C. Discriminatory Intent

In Village of Arlington Heights v. Metropolitan Housing Development Corporation, 429 U.S. 252, 266-68 (1977), the Supreme Court set out principles in determining whether an illegitimate racial purpose exists behind state action. The Supreme Court stated that a racially invidious motive may be evidenced by a racially disparate impact, or sometimes by a clear pattern, unexplainable on other than racial grounds, emerging from state action even though the action appears neutral on its face. The historical background of the decision may also be an evidentiary source as well as the specific sequence of events leading to the challenged decision. Further evidence of such a racial purpose may be revealed by departures from the normal procedural sequence or in a substantive manner, especially if factors usually considered important by the decisionmaker strongly favor a contrary decision.

Mr. Reynolds has said that the Arlington Heights indicia of discriminatory intent would be enough to prove a case when he has talked about the matter in the abstract. Yet, look at (1) the historical background of this decision. No black in Louisiana has been elected to Congress in this Century or to a statewide position ever (P.B.S. Pinchback, a black man, was appointed Governor during Reconstruction). This is in a state where blacks are 29% of the state's population, and where there is a history of official discrimination against blacks. Mr. Reynolds' also points, as helpful proof of intentional discrimination, to (2) the degree to which the action departs from procedural norms. Here a majority black district would have passed but for the intervention of the Governor. As a direct result of his veto threat, the legislature departed from criteria previously adopted for reapportionment. After his intervention members of the legislature convened in a secret meeting, excluded blacks deliberately, attempted to circumvent the Louisiana Open Meetings Law which requires notice of meetings be provided to all legislators, and considered the interests of all other parties, except blacks. When the conference committee was finally appointed, participants, staff members and witnesses, recognized that the purpose and result of the new plan was to "eliminate the existence of a black district from the plan." The "specific sequence of events leading up to the challenged decision," Arlington Heights, supra, 429 U.S. at 267 provides evidence of an intent to discriminate.

An inference of intentional discrimination is reinforced by other evidence in the Section 5 record. The evidence before Mr. Reynolds showed unusual and tortured lines shaping the

Second District,[6] taking an especially sinuous path through the concentration of black voters in New Orleans, and combining extremely divergent communities of interest in one district. The evidence is uncontested that the Second District is dominated by Jefferson Parish, and that this was intentional. An inference can therefore be drawn that the resulting submergence of the voting strength of black voters in the Second District with the domination by predominantly white Jefferson Parish was also intentional. Supporting this inference was evidence in the Section 5 files of the racially polarized electorate and the effect of the majority vote requirement.

The Assistant Attorney General speaks in lofty tones about the need for colorblindness and in a speech at Amherst he condemns what he claims is the direct result of the past decade of affirmative action and other race conscious remedies. He criticizes race conscious remedies for creating a "racial spoils system" in America.

Yet, where a race-conscious effort is taken to assure reelection of white incumbents, he declines to act.

One of Mr. Reynolds' predecessors during the Nixon Administration, Jerris Leonard, testified under oath a month ago that Act 20 was one of the most egregious and blatant racial gerrymanders that he had ever seen:

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[6] Subsequently at trial, Mayor Morial testified that the sinuous course of the lines were confusing (Deposition at 38), and the Governor admitted that under Act 20 in the First and Second District, "alot of people don't know who their congressman or woman is now." (Vol. IV, Tr. 69).

> I think it is fair to characterize it as falling into the category of the only two cases that I can think of where a legislative body intentionally, overtly intentionally went out to disenfranchise black voters.

He compared it to the infamous gerrymander in Gomillian v. Lightfoot, 364 U.S. 339 (1960) "where the Board of Supervisors in Tuskegee, Alabama annexed territory to increase the size of the city, but in doing so excludes all the blacks around the city from the annexation. I would put Major v. Treen into that category of a blatant intentional racial gerrymander."

I would like to close with the conclusion of the Leadership Conference on Civil Rights Report issued three years ago and still true:

> A legal system can be fair and just only if the people who administer it have certain qualities: open-mindedness, a willingness to investigate the facts of each case thoroughly, a readiness to enforce laws with which they may disagree, and an ability to recognize their own preconceptions and biases and to seek to set them aside in carrying out the law. These qualities are difficult to define with precision and even more difficult to attain.
>
> But one thing has become painfully clear. At the Justice Department in 1982, [and I would add in 1985] these basic qualities of fair-mindedness and fidelity to law are lacking. Instead, power and prejudice hold sway.

U.S. Department of Justice

WBR:GWJ:JGH:ce
DJ 166-012-3
E3028

Washington, D.C. 20530

6 JAN 1983

Ms. Lani Guinier
NAACP Legal Defense Fund
10 Columbus Circle
New York, N. Y. 10019

Re: Major v. Treen, C.A. No. 82-1192
(E.D. La.) (F.S. 82-0501)

Dear Ms. Guinier:

This in reference to your letters of December 17 and 21, 1982 concerning our files on the Section 5 submission of the Louisiana congressional reapportionment plan. On December 20-21, 1982, you visited our offices and reviewed and copied most of our files on this matter. Since you also requested the factual portions of our internal memoranda, as well as certain other items, we agreed at that time to advise you further on those additional materials.

Since your visit, we have completed our review of all the materials that you requested. In response to your request, we have included herewith the following:

1. Travel authorizations and vouchers of Mr. Wm. Bradford Reynolds for three trips taken to Louisiana in 1981. Mr. Reynolds' itineraries for these trips are also enclosed, together with receipts that were attached to the vouchers. These were the only trips to Louisiana taken by Mr. Reynolds during 1981 and 1982.

2. We have examined all of the schedules of meetings for Mr. Reynolds between February 1, 1982 and July 31, 1982. The only schedules which contained references to the issue of congressional reapportionment in Louisiana were the weeks of January 11, May 24, May 31, and June 14, 1982. Copies of those weekly schedules are enclosed. Please note that we have excised those portions of the schedules that are unrelated to Louisiana congressional reapportionment.

   Mr. Reynolds held no meetings with officials of the State of Louisiana concerning congressional reapportionment other than the meetings described above.

3. We have also examined all of the available logs of "outstanding telephone calls" between October 1981 and July 1982, and we have included those portions of all of the logs that contained references to Louisiana congressional redistricting. As with the weekly schedules described in paragraph 2 above, we have excised those listings on the telephone logs that do not relate to Louisiana congressional redistricting.

   The entries on these logs reflect telephone calls made to Mr. Reynolds when he was either out of the office or otherwise not available.

There is no log of outgoing telephone calls made by Mr. Reynolds, nor is there a log of calls actually taken by Mr. Reynolds while in his office. Also, there are no memos, documents or other materials which recorded any of the conversations identified on the telephone logs.

4. Mr. Reynolds' handwritten notes of meetings held with Louisiana Governor David Treen on January 11, 1982 and May 31, 1982. Attached to Mr. Reynolds' notes from the May 31, 1982 meeting is a listing of other persons who also attended that meeting.

5. An excerpted version of a memorandum written by Mr. Robert N. Kwan, an attorney in the Voting Section. The abbreviated version of the memorandum retains generally the facts as set forth by Mr. Kwan, but we have excised those portions showing Mr. Kwan's analysis of those facts and his application of the appropriate legal standard. Of course, the analysis and conclusions relied on by Mr. Reynolds in reaching his decision are set forth in his memorandum of June 18, 1982, a copy of which has already been provided to you.

You also have asked us to produce the original of Mr. Reynolds' memorandum to the file dated June 18, 1982, and the lexitron diskette on which it was typed. We are unable to release to you the original of the memorandum since it is our policy to maintain such originals within the Department. For similar reasons we are unable to release the diskette.

In regard to this request, however, we note that when you visited our offices on December 20-21, 1982, you inspected the original of the memorandum dated June 18, 1982. At that time, you informed attorneys in the Voting Section that you wanted to obtain the original of that memorandum and the lexitron diskette on which it was typed so that you could determine the date on which the June 18, 1982, memorandum was typed. As it appears on the diskette, the June 18 memorandum is undated, but in all other respects is identical to the memorandum provided to your co-counsel, Mr. Kellogg, last July. The diskette does not reveal the precise date that the memo was typed. The date was apparently typed on the memorandum after it was printed from the diskette. However, other documents on the diskette are dated mid-July 1982, and we believe that the memorandum at issue was typed at approximately the same time. We can assure you that the memorandum was typed sometime after the mailing of the June 18, 1982 decision letter. The memorandum was dated June 18, 1982, since it was drawn to record, for Departmental record purposes, the reasons for the June 18, 1982 decision. To the best of Mr. Reynolds' recollection, he drafted the June 18, 1982 memo in handwritten form either on that date or within a few days thereafter. We have searched Departmental files and it appears that Mr. Reynolds' handwritten draft of the June 18 memorandum has been discarded, as is our customary practice with regard to handwritten drafts.

We believe that this response complies fully with your request for factual information. As we have noted in the past, we are willing to cooperate with you in this matter to the fullest extent possible. However, we must, at the same time, iterate our basic position that the Attorney General's application of Section 5 to a particular factual situation such as this is not subject to judicial review and is not discoverable. See Morris v. Gressette, 432 U.S. 491 (1977).

Please feel free to contact us if you have any questions.

Sincerely,

Wm. Bradford Reynolds
Assistant Attorney General
Civil Rights Division

By: Gerald W. Jones
Gerald W. Jones
Chief, Voting Section

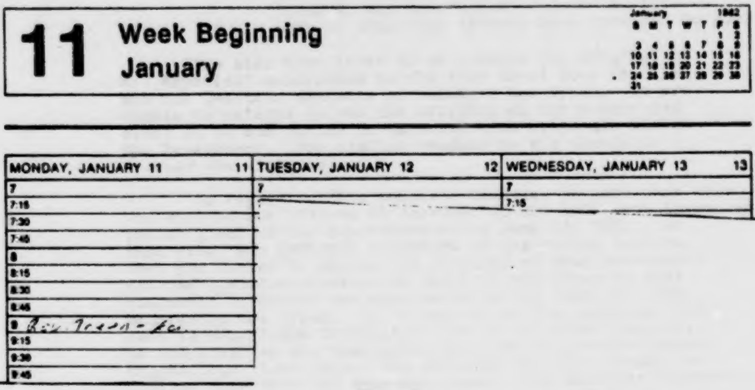
U.S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General
Washington, D.C. 20530

MR. REYNOLDS' SCHEDULE
MONDAY, JANUARY 11, 1982

9:00 a.m. Meet w/Gov. Treen, Alabama
Re: Redistricting
C. R. Conf. Room



11 Week Beginning January

January						1982
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31						

MONDAY, JANUARY 11 11	TUESDAY, JANUARY 12 12	WEDNESDAY, JANUARY 13 13
7	7	7
7:15		7:15
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7:45		
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8:15		
8:30		
8:45		
9 Gov. Treen - La.		
9:15		
9:30		
9:45		

5/27/82
5:00 p.m.

MR. REYNOLDS' SCHEDULE
WEEK OF MAY 24

4:30 p.m. Meet w/Turner, Jones re: Louisiana Redistricting

6/ 4/82
9:00 a.m.

MR. REYNOLDS' SCHEDULE
WEEK OF MAY, 31

MONDAY, MAY 31

2:00 p.m. Meet w/Gov. Treen w/Turner, Jones

6/17/82
6:00 p.m.

MR. REYNOLDS' SCHEDULE
WEEK OF JUNE, 14

FRIDAY, JUNE 18

1:00 p.m. Meet w/Turner, Jones re: La Congressional Redistricting

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OUTSTANDING TELEPHONE CALLS
WEDNESDAY, NOVEMBER 4, 1981

3:50 p.m.	Governor Treen Re reapportionment (Left word in Mr. Schmults's office for you to return call.)	A.C. 504 342-7295

OUTSTANDING TELEPHONE CALLS
FRIDAY, NOVEMBER 13, 1981

11:00 a.m.	Governor Treen	A.C. 504 342-7295

OUTSTANDING TELEPHONE CALLS
THURSDAY, DECEMBER 31, 1981

11:00 a.m.	Ken Starr Gov. Treen of La. will be in town on Jan. 11 and would like to meet you in the morning re La. Congressional redistricting. (He has a meeting at the White House at 11:30 a.m. and is meeting w/Sec. Watt at 2:30 p.m.) Mr. Starr said that the Gov.'s office would like a tentative indication today. Told Mr. Starr that we would call the Gov.'s office and also let him know. I checked your calendar for 1/11 and you have a Deputies' meeting at 9:00 a.m. and a mtg w/Dan Seiligman of Fortune at 11:00 a.m. Would you like to meet w/the Gov. at 10:00 a.m.?

/ **OUTSTANDING TELEPHONE CALLS**
MONDAY, JANUARY 4, 1982

Confirmed meeting w/Gov. Treen for Jan. 11 at 10:00 a.m. in your office. Noted it on calendar.

OUTSTANDING TELEPHONE CALLS
THURSDAY, JANUARY 7, 1982

3:15 p.m.	Governor Treen Would like to know if you have any misgivings about his releasing Mon.'s visit w/you to the media when he gives them his schedule of meetings in Wash., D.C.	A.C. 50[illegible] 342-72[illegible]5

OUTSTANDING TELEPHONE CALLS
MONDAY, APRIL 19, 1982

3:30 p.m.	Gov. Dave Treen Louisiana	504/342-7295

OUTSTANDING TELEPHONE CALLS
WEDNESDAY, APRIL 21, 1981

11:15 a.m.	Gov. Treen	504/342-7295

OUTSTANDING TELEPHONE CALLS
FRIDAY, APRIL 23, 1982

10:05 Governor Dave Treen 502-342-7295

OUTSTANDING TELEPHONE CALLS
FRIDAY, APRIL 23, 1982

2:45 p.m. Gov. Dave Treen
returned your call 504/342-7295

OUTSTANDING TELEPHONE CALLS
WEDNESDAY, MAY 26, 1982

11:48 a.m. Governor Treen
Will call back

1-11-82

file: La Redistricting (WBR Notes)

1.22

Meeting with Gov. Treen

① Basic Parish [illegible] this stand

② Redistricting

- Eight districts - none majority black
- No purpose - never even heard gerrymandering
- N.O. is now 50/50 black
- Second & Eighth Cong Dist = best chance to elect blacks
  - Treen plan - increased black representation
  - 1 - 36.5 · Treen 33.9 · Alt. 26.5
  - 2 - 40.7 · Treen 42.5 · Alt 50.7
  - Final submission
    - 2 - 44.5
    - 8 - 38 (up from 33)
  - Compromise is to get blacks in 2d dist, not to move blacks out

5/31/92

File: 1.22.1
La Redistricting
(WBR Notes)

Louisiana Redistricting

State House

N.O. - Population decrease
% increase in blk population
- Plans developed by Rep. Bruneau (W) and Charbonnet (B)

Issue taken as to 17 black-majority districts under existing plan because some are grossly underpopulated
- E. Baton Rouge - instance (63-70)
Dist 63 (Scotlandville) - black, but no growth
Dist 67 (Southland area ~~[illegible]~~) - black
Dist 66 (Istrouma area) - White
(The Blk Caucus plan carves out another Dist. in a hi-growth area)
In moving into E. Baton Rouge to find people to add to Dist 62, there is a community of interest (much more rural)
- Alexandria area (Dist 25-27) 26.8% (Rapides) 47.9% (Alex)
(57) Guarant. white pop. ← Dist 25 = 48.5 43.2
Dist 26 = 34.5 31.5
Dist 27: 8.0 8.0
- New Orleans (18 to 15 -> 570,000 to 570,000)
Start with Rural Parishes - in East Jefferson
- Dist 102 - 47.4% B; 51.8% W

p.2
(WBR notes)

Louisiana Redistricting

State House

State is 29.4% black (0.4% increase in black population)
105 members - all single-member districts

53 52.4 — Present plan
52.6 52.2 12>60
57.8 5>50 - 17 black-majority districts (1990 Census) = 16%
52 53.3 12>60 2>50 - Reduced to 14 under new plan = 13%

Racial bloc voting
No blk elected to dist. that is less than
63% - 57% VAP

New Orleans needed reduction from 18-15 districts due to pop. decrease

• Black percentage during 10 years went from 45-55% in N.O.

• The number of blk dist. in N.O. under existing plan was 11 of 18 (over 50%) [3 b/t 50/60, 8 over 60]

blk w
95 94 1991 Plan reduces blk dist to 7 (6 over 60%)
91 98 Increases white to 8 dist. (from 7 dist.)
92 99
96 100 St Policy is to respect Parish & Ward boundaries
97 89 • In the Uptown Area (90 & 91) - did not follow
101 88 Lost 2 blk dist. (90 & 91) ward lines; non-compact districts
105 103 Lost 1 blk dist (100) • In 9th Ward (98, 99, 100, 102, 103) = 155,000 pop = equiv of 4 House dist.

Totally w/in Existing plan: 2 of 5 = blk (over 60%)
7 B
6 W New plan: 1 of 5 = blk (over 60%)
+2 W shared Dist. 103 puts communities together that have no community of interest

Lost 1 blk in Mid-City Area (88)

Baton Rouge = ~~[illegible]~~ 62, 72, 73
E & W. Feliciana and St Helena

Alexandria area

Congressional

Treen had proposals A, B and C - identical with Dist 1, 2 & 3

· Principal focus was Orl. - 2d Cong Dist

· Blk pop grown to 40.7%

· Treen proposal increased blk to 43.5%

: N.O. shared by Dist 1 and 2

: Needed to increase Dist 2 - added contiguous areas: 60,962 people needed

: In Treen proposal - 64,012 blk in nearby effective ~~added~~ pop. (Wards 7, 8 and 9)

Removed heavily white area ~~[illegible]~~

Change - 40.7% up to 43.5%

Legis. had many plans - in addition to Gov. Treen's

Massey Plan emerged in Senate - provided maj. blk pop. in 2d Dist

Dist 1 - 17.9%
Dist 2 - 59.0%
Dist 3 - 21.8%

Treen resisted: Completely changed historical complexion of 1st Dist in dramatic way (principally Jefferson Parish)

: Was a "gerrymandering" plan for blacks in Jefferson

: Would have removed 2d strong voice for N.O. in Cong

· Possible implication of continuing black district

: No Racial Bloc Voting - blks elected city-wide

Whites vote for black; but blacks won't vote for whites

Treen modified proposal - added to bring Dist 2 to 44.75%

Legis. final configuration - left Dist 2 at 44.5%

Increase blks in Dist 1 - from [illegible] to [illegible]

Dist 3 from [illegible] to [illegible]

M. Feldman

Legal analysis:

No retrogression

Undoubtedly under Beer no retrogression.

Was no retrog. in voting patterns

No intent to discriminate

Racial voting patterns in 2d Dist --

suggesting that blk voters have

equal access to process, st.

dilution has been satisfied

Precincts in 2 Dist = 68% blk (in N.O.)

- Mayor Morial got 75% in these precincts;

- the Sheriff got 73% in these precincts

Was there dilution to create black dist

- No - there is no constit. imperative

to give max.

① Narrowed in its focus

② Equal access

③ Failure to elect blk does

not create dilution

④ St. has no duty to maximize

- blk Dist

Impact of blacks [illegible] all [illegible] [illegible]

[illegible] submission

Louisiana redistricting Hou: + Cong.
5/31/82

Name	organization
Brad Reynolds	AAG
Jim Turner	D AAG
Gerald Jones	Voting Sec.
Bob Kwan	" "
Peppi Bruneau	La House of Representatives
David R. Poynter	La. House of Rep.
John J. Hainkel Jr.	La House of Rep
[illegible] C [illegible]	Gov. of La
MARTIN L.C. FELDMAN	SPECIAL COUNSEL TO GOV. OF LA

Mtg. w/Gov. Treen et al. 5/31/82
G.W.J. Nts

Congressional

TREEN: Wanted to create districts which were fair to all

	Exist.	1st	2nd
1.	(36.5%)		
2.	(40.7%)	43.5%	44.75%
3.			

* Dist. 2 had to receive 60,000 + people. These were added within City of New Orleans and consisted of areas which were 64.01% bk

Nunez plan provided for a blk. majority district but Treen resisted because it completely changed the configuration of Dist 1 ~~and~~. Reasons he resisted:

- Power grab attempt by Jefferson Parish Tax ~~ass~~ collector
- Resistance to conscious effort to create a black majority district

- No retrogression under Beer.

No conscious effort to create a blk district but also did not seek to avoid one.

- Conscious effort to create a dist. to accommodate the growing phenomena of black precincts.

2W

5/31/82
Green
Hainkel
Bruneau
Pogolo
Jay Stone – La Rep in D.C.
Marty Pillman – Special Counsel
on Congressional

Hainkel – met w/ Rank
left materials

historical background
CDI.

said using recent results on
about

centralized in EBR –
growth in north
part

took one here & eliminated
one ~~other~~ elsewhere

N.O.

WBR – increase in black %, but
loss of pop.

Hainkel 3 split districts – 2 split districts
old new
Rep. Charbonnet & Blanchard
FTL drew plan for N.O.
do it a different way → shift
WBR – EBR + Alexandria

1970
~~[illegible]~~ - district % 1980 idea
16% ~~[illegible]~~ ~~majority come~~ up with a track
to, but
of can be done

- bottomline against
retrogression

Treen - 17 to 14
~~[illegible]~~
Chart whatever it is worth

Poynter - population decrease
in cities in Louisiana.

Shreveport - new majority black
district
~~Lake Charles~~ -

Vote
① white decreases
② pop decreases but
black increases
③ black pop growth.

declining population

trifurcate E, BR.

JPT - interested in why proposed plan,
not

Poynter - growth to south [illegible]

T.P.
10/24/81

Breaux - every piece interlocked

no roads.
domino effect >

26
29

Congressional Plan

Treen - Feldman
familiarity
great interest in Cong. plan.

did not particularly want a role in Cong reapportionment

Only one w/ statewide constituency presented 3 Plans

~~[illegible]~~
will fight power grab.

(1) Change historically complexion of 1st District
political boss Lawrence Chehardy wanted to dominate district

(2) Pack in black population.

(3) Domino effect in rest of the state
(4) Jefferson Parish district refuted by fact that Treen elected.

what about 3rd

(5) two ones in plan
[illegible]

(6) ~~[illegible]~~ Deliberate creation of black majority districts — questionable or of nominal accord

[illegible] (7) usually elected city wide in N.O. at large (mayor, sheriff, district judge.

Treen
Thinks will elect a black in 2nd district when Boggs retires

Not neat configuration of final plan.

Jefferson dominates St. B., Plaq. + N.O.

Governor's veto overridden?
Chehardy?

Question how Treen proposals
divide Jefferson Parish.

Jefferson Parish delegation
very strong.

Feldman - no retrogression
not answer
① voting patterns - no CSV
② black voter equal access -

FEW
Orleans - 68% black
portion 75% vote. racial
73% vote voting
Jefferson Parish - influx of blacks to
those pcts?

Is creation of black district
constitutional imperative?

district increased ?

232.863
526605
44.22% Orleans

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voting analysis.

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why did not go for 43.5?
Breaux + Tauzin opposed
Treen plan.

SECTION 5 SUBMISSION ANALYSIS

Reapportionment of Congressional Districts
in the State of Louisiana
by
Act No. 20 of the First Extraordinary Session
of the Louisiana Legislature of 1981

TIME LIMIT

Received	December 17, 1981
More Information Received	April 19, 1982
Due Out	June 18, 1982

FACTUAL REVIEW AND ANALYSIS

By: Robert N. Kwan
Attorney
Voting Section

I. RELATED LITIGATION

A lawsuit challenging the submitted legislation on Section 5 and constitutional racial vote dilution grounds is currently pending. Major v. Treen, C.A. No. 82-1192-H (E.D. La.). 1/ Last week, a single-judge court on an uncontested motion for summary judgment ruled that the present Congressional apportionment plan adopted in 1971 violates the "one-person, one-vote" Fourteenth Amendment standard. Discovery is now underway in this litigation on the merits of the 1982 Congressional reapportionment plan. A three-judge court has been designated to hear this action (Circuit Judge Politz and District Judges Collins and Cassibry).

The same federal district court dismissed as premature a second lawsuit brought under 2 U.S.C. §2 on behalf of a prospective Congressional candidate to fix Congressional district boundaries so that he can run. Couhig v. Brown, C.A. No. 82-1136-D (E.D. La.).

1/ The Major lawsuit also challenges the legality of Act No. 1 of the First Extraordinary Session of the Louisiana Legislature of 1981 providing for the reapportionment of the Louisiana House of Representatives. Subsequent to the filing of that action, a Section 5 objection was interposed to the House plan on June 1, 1982. The district court has severed the House reapportionment controversy from Congressional reapportionment.

II. INTRODUCTION

A. Recognition of the Need for Congressional Reapportionment

Reapportionment of Congressional districts by the Louisiana Legislature is mandated by the Art. I, §2 of the United States Constitution and Art. III, §1 of the Louisiana Constitution of 1974.

Congressional districts were last reapportioned in 1972, and that plan received Section 5 preclearance on June 30, 1972. Under the 1980 Census, the present apportionment plan for Congressional districts is malapportioned (a maximum deviation of ± 21.95%). The State of Louisiana has eight Congressional districts, a number it has had since 1933. The size of the ideal Congressional district under the 1970 Census was 455,580 persons and under the 1980 Census, the figure rose to 525,497 persons. Given the stringent population equality requirements of Congressional reapportionment, it is likely that the present Congressional districts would not meet "one-person, one-vote" Fourteenth Amendment requirements. *Kirkpatrick* v. *Preisler*, 394 U.S. 526 (1969); *White* v. *Weiser* 412 U.S. 783 (1973).

The Louisiana Legislature recognized in early 1981 that there was a need for Congressional reapportionment and began its proceedings to undertake this legislative responsibility. In January 1981, Senator Thomas H. Hudson, Chairman of the Senate Reapportionment Study Group, advised David C. Treen, Governor of the State of Louisiana, of the need for Congressional and legislative reapportionment and recommended that reapportionment take place outside the regular legislative session to minimize interference with regular legislative business. Governor Treen agreed, and he ordered that a special two-week legislative session to consider reapportionment was scheduled to begin on November 2, 1981. 2/

2/ Under state law, legislative reapportionment is primarily the obligation of the Louisiana Legislature, but if that legislative task is not completed by December 31, 1981, the last day in the year after the latest federal decennial census, the reapportionment obligation devolves to the Louisiana Supreme Court. Louisiana Constitution, Art. III, §6(B).

B. The Reapportionment Process

The formal reapportionment process began in mid-July 1981 at the close of the regular 1981 legislative session with the appointment of the members of the Congressional reapportionment subcommittees in both houses of the legislature. 3/ (Separate subcommittees were set up for state legislative reapportionment.) Senator Samuel B. Nunez, Jr., President Pro Tem of the Louisiana Senate, was named the chairperson of the Senate Congressional reapportionment subcommittee. Representative John "Jock" W. Scott was selected as the chairperson of the House Congressional reapportionment subcommittee.

At the first meeting of the Congressional reapportionment subcommittees, which was a joint session, held on July 21, 1982, rules for Congressional reapportionment were adopted. On population equality, the subcommittees adopted a rule limiting a maximum deviation for Congressional reapportionment to + 1.00%. As for legislative reapportionment, a rule was enacted to avoid dilution of minority voting strength. At this meeting, both technical aspects of reapportionment (e.g., the data base) and the legal aspects (e.g., requirements under the "one-person, one-vote" constitutional standard and the Voting Rights Act) were discussed.

Hearings of the Congressional reapportionment subcommittees were conducted from July through October 1981. The hearings took place at different regional locations throughout the state to allow the public to comment on Congressional reapportionment. The proceedings in these committee hearings focused on reapportionment in specific regions of the state (e.g., Rapides and Calcalsieu Parishes, Orleans and Jefferson Parishes). Various proposals were presented, including those of the Louisiana Congressional delegation and of Governor Treen. While the Louisiana Congressional delegation did not have the technical abilities of the State legislature in terms of computer access to the data base, it did develop its own proposals and was kept in consultation with the reapportionment work by the subcommittees. Governor Treen publicly released his three Congressional reapportionment proposals, but these were not presented until October 22, 1981, which was late in the subcommittee hearing process.

3/ These subcommittees were under the jurisdiction of the Senate Committee on Senate and Governmental Affairs and the House Committee on House and Governmental Affairs.

C. The Special 1981 Legislative Session

1. November 2, 1981

On November 2, 1981, the First Extraordinary Session of the Louisiana Legislature of 1981 convened. Congressional reapportionment did not come before the full Louisiana Legislature until this special 1981 legislative session. 4/ Various bills to reapportion the Congressional districts were introduced during this session (i.e., Senate Bills 4, 5, 6 and 28 and House Bills 2, 25 and 26), but of these, only Senate Bill 5, House Bill 2 and their amendments were seriously considered.

On the Senate side, on November 2, the first day of the special session, Senate Bill 5 was introduced in the Senate by Senators Nunez and Tiemann. The Congressional reapportionment plan in Senate Bill 5, known as the "Nunez Plan," provided for a Jefferson Parish based district (72% of the First Congressional District would be in Jefferson Parish) and an Orleans Parish based district (94.9% of the Second Congressional District would be in that parish). The First District under this plan would encompass the West Bank of Jefferson Parish (i.e., the portion of Jefferson Parish on the west side of the Mississippi River), Plaquemines and St. Bernard Parishes. The Second District would include only the large portion of Orleans Parish on the East Bank of the Mississippi River. Because the Second District under the Nunez Plan would include almost all of Orleans Parish, it would be 54.0% black in population. 5/

4/ The record of the 1981 special legislative session is set out in the "1981 Official Journal of the Proceedings of the Senate and House of Representatives of the State of Louisiana and the Legislative Calendar, Seventh Extraordinary Session of the Legislature under the Constitution of 1974." The First Extraordinary Session of the Louisiana Legislature of 1981 is the seventh extraordinary session of the legislature under the Louisiana Constitution of 1974.

5/ In terms of Jefferson and Orleans Parishes, this configuration would differ from the present apportionment plan as the First and Second Districts would not staddle both banks of the Mississippi River and would not combine portions of both parishes. There are other differences between the present and Nunez plans as will be discussed below.

On the House side, Representative Scott introduced House Bill 2 into the Louisiana House of Representatives. The Congressional reapportionment plan in House Bill 2, known as the "Scott Plan," would provide for a 50.2% black majority population district in the Second Congressional District, but it would retain the division of Jefferson and Orleans Parishes similar to the existing lines.

2. November 4, 1981

On November 4, the Senate Committee on Senate and Governmental Affairs reported out Senate Bill 5 with minor amendments and sent it to the Senate floor for consideration by the full Senate that day. Further technical amendments in Senate Bill 5 were adopted, but more signficantly, two substantive amendments to the bill were rejected by the Senate. One rejected amendment embodied one of Governor Treen's three Congressional plans, Proposal A. 6/

On the same day, the Senate finally passed Senate Bill 5 as amended by a vote of 31 to 6 and sent it to the House of Representatives for action.

In the House Committee on House and Governmental Affairs, House Bill 2 was reported out with amendments. The amendments were significant as the committee voted by a vote of 12 to 3 to replace the "Scott Plan" with Governor Treen's Proposal B. By the same margin, the House committee rejected an amendment to incorporate the Nunez Plan into House Bill 2.

3. November 6, 1981

On November 6, in proceedings before the full House of Representatives, an amendment is proposed to amend House Bill 2 by incorporating Governor Treen's Proposal A instead of Proposal B. The House rejects this amendment by a vote of 51 to 47.

6/ In an article on the Senate vote rejecting Treen Proposal A, the Times/Picayune, one of the leading newspapers in the city of New Orleans, observed, "With Treen's top aides, John Cade and William Nungesser, lobbying in the rear of the chamber, the proposal made a surprisingly good showing, losing only 20-17." Times/Picayune, November 5, 1981.

Next, Representative Alario moved to amend House Bill 2 by substituting the Nunez Plan for Treen Proposal B, and the amendment to incorporate the Nunez Plan was adopted by the House by a vote of 59 to 38. A floor amendment was offered to amend House Bill 2 to be a plan similar, if not, one of the Treen proposals, but by a vote of 49 to 45, the House votes to decide the final passage of House Bill 2. House Bill 2 incorporating the Alario amendment (i.e., the Nunez Plan) was finally passed by the House of Representatives by a vote of 61 to 38 and was sent to the other chamber.

Thus, in both houses of the legislature, Congressional reapportionment bills incorporating the Nunez Plan were adopted by both the Senate and the House. 7/

After the House votes on Congressional reapportionment, Governor Treen that evening issued a public statement that "Any bill in that form is unacceptable and without question will be vetoed." Times/Picayune, November 7, 1981. (At the May 31, 1982 conference with Mr. Reynolds, Governor Treen admitted that he publicly threatened to veto any legislation embodying the Nunez Plan.).

After House Bill 2 was sent over to the Senate that day, it was discovered that there had been a technical defect in the legislation. According to Glenn Koepp, staff member of the Senate Legislative Services Office, the Alario amendment left out one voting precinct in Jefferson Parish. Mr. Koepp said that under the Louisiana Constitution, final enactment of legislation must be in a single instrument approved by both houses of the legislature, and only then, does it go to the Governor for action. According to Senator Nunez and Mr. Koepp, the Senate leadership decided not to ratify House Bill 2 because it would afford Governor Treen a technical excuse to carry out his public threat of a veto and decided to wait over the weekend until Monday November 9 to straighten out the technical variance. 8/

7/ This indicates that at the May 31, 1982 conference with Mr. Reynolds, Governor Treen and Speaker of the House of Representatives, John J. Hainkel, Jr., misspoke in stating that the Nunez Bill would not have passed the House of Representatives.

8/ Alternatively, the House might have adopted Senate Bill 5, which had been sent to the House after its final passage in the Senate on November 4, but that bill was not procedurally ready for action in the House of Representatives as of November 6.

The news reports characterized the rejection of the Treen Congressional reapportionment proposals and the adoption of the Nunez Plan as a rude shock to the Treen Administration. Times/Picayune, November 7, 1981. The Congressional reaction to the events of November 6 was mixed. The Times/Picayune on November 10, 1981 reported that Congressmen Breaux, Long, and Tauzin were at the State Capitol on November 6 to lobby against the Treen proposals. Jack Wardlaw, reporter-columnist for the Times/Picayune in his column of November 15, 1981, attributed the legislature's actions in part to Treen's proposals which would have adversely impacted on three Democratic incumbents, Breaux, Long, and Tauzin, to Republican advantage. The Times/Picayune reported on November 7 that Congresswoman Boggs said, "I certainly have no personal problem with it [i.e., the Nunez Plan] at all,"but also that Congressmen Livingston and Moore opposed the Nunez Plan.

4. November 9, 1981

Early in the day, Governor Treen held a news conference and released his so-called "Reconciliation Plan," which would provide for a reapportionment plan similar to his earlier three proposals and which would not include a majority black district in New Orleans. Governor Treen also reiterated his threat to veto the Nunez Plan, if further action is made on that plan. Times/Picayune, November 10, 1981.

The full House considered Senate Bill 5, which on November 6, the Committee on House and Governmental Affairs had reported out with amendments incorporating a proposal similar to Governor Treen's plans. Representative Alario moved for amendments in Senate Bill 5 to adopt the Nunez Plan, but these amendments are rebuffed by the House by a vote of 54 to 45. Representative Bruneau next moved to amend Senate Bill 5 to incorporate the Treen Conciliation Plan presented only hours earlier, and the amendment was adopted by a vote of 74 to 26. The amended bill was finally passed by a vote of 79 to 22 and returned to the Senate. 8/

8/ These actions in the House constituted a reversal of its votes on Friday November 6. The Times/Picayune noted that the Treen Administration heavily lobbied state legislators over the weekend against the Nunez Plan. Times/Picayune, November 10, 1981.

Upon receipt of the amended Senate Bill 5, the Senate rejected the House amendments to its bill by a vote of 28 to 3. This forced the necessity of a conference committee to work out the differences between the two legislative chambers.

5. Negotiations and Adoption of a Plan, November 9-12, 1981

On November 9, after the Senate and House failed to come to an agreement on Congressional reapportionment, Senate President O'Keffe took aside Senator Nunez and Jefferson Parish Assessor Lawrence Chehardy, representing the Jefferson Parish legislative delegation, Victor Bussie of the AFL-CIO, to tell them that unless a compromise on the configuration in Jefferson and Orleans Parishes is worked out, the special legislative session may end without a Congressional reapportionment plan. And none might not be enacted until the following regular legislative session in April 1982. 9/ Many legislators feared that the public would find the failure to reapportion irresponsible and the need to call another special session wasteful.

A formal conference committee was appointed on Tuesday November 10, which consisted of Senators Hudson, Nunez and O'Keffe and Representatives Alario, Bruneau and Scott. But the actual work of hammering out a settlement took place in the Senate Computer Room in the State Capitol basement and the Governor's Suite upstairs. In the basement computer room, the Jefferson Parish delegation and Democratic Congressional representatives and the Senate leadership tried to work out their compromise proposal. 10/

9/ Senator Nunez maintains that it was "common knowledge" that Governor Treen would not call another special legislative session to finish Congressional reapportionment if a gubernatorial veto were interposed and that it would have to wait until April. Nunez said that the Governor told him in person a special session would not be called Senator Hudson said that he has no understanding that the Governor threatened not to call another special session if necessary. However, House Speaker Hainkel, an ally of Governor Treen, stated that "1,000 percent convinced" that the Governor would veto a bill incorporating the Nunez Plan and that "[i]f that happens, we may well have to wait until April and the next regular legislative session." Baton Rouge State Times, November 10, 1981. The Hainkel statement would seem to support the Nunez allegation.

10/ Participants in the basement working out alternatives on the State computers were Jefferson Parish Assessor Chehardy, State AFL-CIO President Victor Bussie, Senate President O'Keffe and Senators Nunez and Laurcella, Representative Alario, Congressman Long and aides to Congresswoman Boggs, Long and Tauzin, and members of the Senate administrative services staff. No member of the Louisiana Legislative Black Caucus participated at these sessions, nor were the aides of Governor Treen or of Congressmen Livingston and Moore.

According to Senator Nunez and Mr. Chehardy, the Capitol Basement group tried to strike a balance to raise the Jefferson Parish proportion and the black percentage within the parameters of the Governor's requirements. After the plan was agreed upon by that group, it was taken up later that night to the Governor for his examination. 11/ Governor Treen was noncommittal on the proposal at that time and indicated to the group that the plan did not look "proper." Chehardy recalled that he responded that the plan had to look that way in order to meet the Governor's requirements. 12/ On Wednesday November 11, the next day, Governor Treen signalled that he could accept the plan and would not veto it.

11/ According to Lawrence Chehardy who helped present the alternative plan, those present included Governor Treen, William Nungesser, a Treen aide, Congressman John Breaux, Senator Nunez and himself.

12/ Mr. Chehardy stated that Congressman Breaux was concerned because Governor Treen had not given any sign whether he would go along with the compromise and later called the Governor at his mansion later that evening. Mr. Chehardy and Senator Nunez were present when Congressman Breaux made his call to Governor Treen and the Congressman spoke in a way to let the others in the room know what was being said and after the conversation was over, told them the substance of the telephone conversation. According to Mr. Chehardy, Congressman Breaux asked the Governor what his opinion was of the compromise plan. Governor Treen stated that he had serious problems in the Orleans and Jefferson Parishes area because the lines look funny, the "head of a dog." Governor Treen added that he was concerned about dilution of minority voting strength as there would be no potential for minority growth potential in the Second Congressional District. In response, Congressman Breaux pointedly asked Governor Treen then why did the Governor would refuse to sign a plan (i.e., the Nunez Plan) which would increase black political participation. Governor Treen then said that he would discuss the proposal with Congressmen Moore and Livingston at the Governor's mansion and will discuss the plan later with Congressman Breaux. According to Mr. Chehardy, Congressman Breaux felt that Governor Treen was still holding out for the possibility that the legislature would adopt something closer to his own three proposals. (continued)

In the evening of Wednesday November 11, the conference committee formally met. The Senate leadership, including Senators O'Keffe, Hudson and Nunez, said that while the plan may not be as satisfactory as some would have wanted, the legislature has an obligation to the people to devise a Congressional reapportionment plan. The compromise plan was adopted by a vote of 4 to 2 with Representatives Scott and Alario dissenting. Representative Scott insisted on proposing amendments to create a majority black district in New Orleans, but those amendments were rejected.

The plan which came out of the conference committee became Act No. 20, the submitted legislation. The plan worked out in the negotiations between the Jefferson Parish delegation and the Governor and adopted by the conference committee did not include a majority black district, but did provide for a district which would be 55% Jefferson Parish in population.

Both the full House and Senate finally passed the conference committee plan, the amended Senate Bill 5, on November 12, 1981, the last day of the special session. Governor Treen signed it into law on November 19, 1981.

II. DISCUSSION

A. Racial Effect

In Beer v. United States, 425 U.S. 130, 141 (1976), the Supreme Court held that "[t]he purpose of Section 5 has always been to insure that no voting procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise."

Later that night, Congressmen Livingston and Moore tried to persuade Governor Treen to accept the compromise. See Times/Picayune, November 13, 1981. Apparently, Governor Treen was hesitant about the plan because it placed his Metarie home in Congresswoman Boggs's district. While the Governor issued a denial, the general understanding in the legislature is that this was true. On the morning of Wednesday November 11, Treen aide John Cade admitted to Senator Nunez that the Governor was not happy that his house was in Congresswoman Boggs's district and asked if the legislature to bring over Congressman Livingston's district into Jefferson Parish to pick up Treen's residence. Senator Nunez answered that since the Governor got his way on everything else on the plan, accomodation of this request would jeopardize the compromise and said that either the compromise plan be adopted or no plan will be enacted this special session.

The last valid Congressional apportionment plan under Section 5 is the precleared 1972 Plan. A comparison of the 1972 and 1981 Plans under the 1980 Census indicates that the submitted plan is not retrogressive. The Second Congressional District, which has the highest black population percentage, was 40.7% black under the 1972 Plan, but would be 44.5% black. There is no black population majority district under either plan.

The Nunez Plan which provides for a 54.0% black district cannot be considered the standard for measuring retrogression under the Beer analysis because it was not a final enactment under state law. While the Nunez Plan was finally passed in both houses of the legislature, it was not embodied in a single instrument adopted by both houses of the legislature and either signed by the Governor and enacted into law through an override of a gubernatorial veto.

Under the old plan, the two districts with the highest black percentages were the First and Second Congressional Districts, which were 40.7% and 36.5% black respectively. But under the submitted plan, the two districts with the highest black percentages are the Second and Eighth Congressional Districts which are respectively 44.5% and 38.3% black. The racial proportions in the other districts in the submitted plan remain much the same as under the old plan. Because of the black population increase in the Second District, the black population percentage in the First District drops seven percentage points to 29.5% black and the black percentage in the Sixth District declines about 4.5% to 25.1% black. But the minority percentage gains and losses seem to even out, and apparently the change is somewhat ameliorative.

B. Racial Purpose

Under Section 5, the submitting jurisdiction also has the burden of proving the absence of a racially invidious purpose in enactment of the proposed voting change. City of Richmond v. United States, 422 U.S. 358, 379 (1975); see also, Beer v. United States, supra, 425 U.S. at 141.

In Village of Arlington Heights v. Metropolitan Housing Development Corporation, 429 U.S. 252, 266-68 (1977), the Supreme Court set out principles in determining whether an illegitimate racial purpose exists behind state action. The Supreme Court stated that a racially invidious motive may be evidenced by a racially disparate impact, though not by itself, or sometimes a clear pattern unexplainable other than race emerging from state action even though the action appears neutral on its face. The historical background of the decision may also be an evidentiary source as well as the specific sequence of events leading to the challenged decision. Further evidence of such a racial purpose may be revealed by departures from the normal procedural sequence or in a substantive manner, especially if factors usually considered important by the decisionmaker strongly favor a contrary decision.

In the 1981 special legislative session, each house of the Louisiana Legislature finally passed the Nunez Plan which would have provided for an Orleans Parish based 54% black population Congressional district, but that plan was never enacted into law. According to members of the legislature (Senator Nunez and Representative Turnley who supported the Nunez Plan and Senator Hudson who opposed it), the likelihood of a bill finally passed by both houses of the legislature with only minor variations to become law is very high. According to Senator Nunez, the odds of such a bill not becoming law was 100 to 1, and in Representative Turnley's view, such a bill would have a 90% chance of passage. It is the view of Senators Nunez and Hudson among others that the Nunez Plan would have been enacted, but for Governor Treen's public threat of a veto.

The sequence of events in the reapportionment process indicate that the role of Governor Treen in the process, particularly in his public threat of a gubernatorial veto, was central in the reversal of the legislature in its adoption of a plan which would incorporate majority black Congressional district. Thus, it becomes crucial to examine Governor Treen's motivation for his participation in the reapportionment process.

There have been allegations that the Nunez Plan was not adopted and the submitted plan was enacted because of racial reasons. Senators Hudson and Nunez, who had primary responsibility in the Senate for Congressional reapportionment, agreed that it would be fair to say that racial considerations played a role in Congressional reapportionment. Senator Hudson, however, said that Governor Treen's opposition to the Nunez Plan was not racism per se, but that while Governor Treen had a concern over the proposed changes in the First Congressional District represented by Congressman Livingston, the Governor insisted on keeping Orleans and Jefferson Parishes divided in spite of the lack of communities of interest and thus, since the growing predominantly white suburban parishes will dominate, the urban interests in New Orleans will not be represented.

The Louisiana Legislative Black Caucus consisting of the two black senators and the ten black representatives unaminously opposed the submitted plan as a dilution of minority voting strength and blames Governor Treen as the one chiefly responsible. See Comment of Louisiana Legislative Black Caucus, January 18, 1982; remarks of Representatives Alphonse Jackson, Johnny Jackson, Jr. and Diana Bajoie, Conference Committee hearing, November 11, 1981. The Louisiana Survival Coalition also maintains that the plan was a purposeful dilution of minority voting strength and that Governor Treen was the central figure. The Survival Coalition also alleges that Governor Treen's resistance of a plan creating a majority black Congressional district may be in part explained by his personal history. See Comment of the Louisiana Survival Coalition, January 7, 1982.

The initial position of Governor Treen towards any inquiry into his reapportionment intent is that what his motives in Congressional reapportionment simply is not relevant to the determination whether the submitted plan is valid under the requirements of the Voting Rights Act. "It should be kept in mind that the congressional districts now under review were determined by an act of the Legislature, not by act of the chief executive of the State." See Memorandum of David C. Treen to William J. Guste, Jr., Louisiana Attorney General, April 7, 1982, at 3 and Attachment A, at 1. This position implies that the Governor had no role in Congressional reapportionment.

There is no question that Governor Treen was heavily involved in the Congressional reapportionment process and that his actions determined the outcome of the process. Governor Treen presented the legislature with three of his own reapportionment proposals and had his aides actively promote those plans in the legislature. He publicly threatened a veto of the Nunez Plan finally passed by both houses of the legislature, which in the views of the legislators, such as Senators Hudson and Nunez and Representative Turnley among others, was the same as actually interposing the veto. His aides aggressively lobbied the legislators during the floor debates in the legislature and significantly over the weekend between the adoption of the Nunez Plan in the House and that body's reversal on Monday. After that weekend, Governor Treen proposed his so-called Reconciliation Plan which the House adopted hours later, and his assent was required so that a compromise could be reached on Congressional reapportionment before the 1981 special session ended. In the views of Congressman Breaux, Senators Nunez and Hudson and the members of the Louisiana Legislative Black Caucus, the submitted plan is basically the Governor's plan as modified. It is clear that the Governor was involved in the process; to suggest otherwise would be as one commenter said to argue that two plus two is not four.

In the submission review process, Governor Treen has enunciated several reasons for his opposition to the Nunez Plan and in support of the submitted plan. Directly on the question of race and Congressional reapportionment, Governor Treen said:

> What I did do was to question the appropriateness of a deliberate, conscious drawing of congressional district lines for the deliberate purpose of achieving a majority black district. I observed that such motives were inconsistent with our goal of a homogenous society. In fact, it is demeaning to blacks to suggest that they must be in an absolute majority in order to effect the election of a member of their race. It is also demeaning to them that they will always vote along racial lines.

Statement of Governor David C. Treen, Attachment A to Memorandum to William J. Guste, Jr., Louisiana Attorney General, April 7, 1982, at 3. 14/

His first statement in the reapportionment process was apparently made on September 7, 1981 when he commented at a news conference that the idea of drawing a majority black Congressional district "smacks of racism." Baton Rouge Morning Advocate, September 9, 1981. On October 26, 1981 Governor Treen at a news conference in answer to a question why his Congressional reapportionment proposals did not incorporate a majority black district, he stated that there is "no constitutional imperative that that be done, nor do I think there is a policy imperative." Times/Picayune, October 27, 1981. Finally, at a third news conference on November 9, 1981 after the adoption of the submitted plan, Governor Treen stated "I question whether the interests of the black people . . . of that city [New Orleans] are better served by concentration in one district, or by having a large and substantial voice, a chance to influence the policy and the decisions of two congressmen, which they would continue to have under this arrangement (referring to my final proposal to the Legislature." Attachment A to Memorandum to William J. Guste, April 7, 1982, at 1.

14/ Governor Treen noted that his three reapportionment proposals enhanced the black population percentage over the current plan in the Second Congressional District from 40.7% to 44.5%.

On this particular issue, Governor Treen also requests that we closely examine the memorandum dated May 28, 1982 filed on his behalf by his special counsel, Martin Feldman. In this memorandum, Mr. Feldman argues that the submitted plan should not be considered discriminatory just because the legislature did not adopt a plan which would guarantee the election of a black Congressman, that is, the Legislative Black Caucus did not get its way. To do so would mean that proportional representation is required. In sum, Mr. Feldman argues that the plan should be precleared because it enhances black voting strength as blacks have a fair shot at electing a candidate of their choice and that they had a fair opportunity to participate in the process.

There are several concerns raised by Governor Treen's views. First, implicit in these statements is the belief that the Nunez Plan had no other legitimate objective other than the intentional creation of a majority black district. In other words, that it was merely an exercise to achieve racial maximization and proportional representation. Mr. Feldman's memorandum leaves the impression that the Governor's opposition of the Nunez Plan simply meant that the Louisiana Legislative Black Caucus did not get its way.

While there was discussion in the reapportionment process to the effect that the creation of a majority black district was desirable 15/, the Nunez Plan had other significant objectives. Another primary interest of the legislature, particularly the influential Jefferson Parish delegation, would be the creation of a Congressional district anchored in Jefferson Parish. The population in that parish had grown from 15% of an ideal Congressional District in 1930 to 87% of one in 1980. Jefferson Parish with a population of 454,000 is the second largest parish in the state, following Orleans Parish as the largest with 557,000. The parishes lay roughly side-by-side, divided primarily by the Mississippi River.

15/ See, for example, the letter of dated October , 1981 from Senator Thomas H. Hudson and Representative John W. Scott, chairpersons of the Senate and House Congressional reapportionment subcommittees to the Louisiana Congressional delegation. The letter recommended that the Congressional delegation recommend proposals which would create (1) a majority black district in Orleans Parish; (2) a Jefferson Parish based district and (3) more compactly configured districts. Various other legislators, white and black, testified at the reapportionment subcommittee hearings that a majority black district would be desirable. The news reports on Congressional reapportionment also took an interest in the issue of the creation of a majority black district, and the subject came up frequently at Governor Treen's news conferences.

The Jefferson Parish delegation wanted the Congressional plan to recognize of the substantial population growth of that parish. The logical by-product of the creation of a Jefferson Parish district would be an Orleans Parish based district across the Mississippi River on the East Bank, which would likely be majority black. The main impetus for the Nunez Plan was not the Louisiana Legislative Black Caucus, but the all-white Jefferson Parish legislative delegation. The success of the Nunez Plan is a direct result of the political influence of the Jefferson Parish.

According to Representative Turnley, the chairman of the Louisiana Legislative Black Caucus, his organization really had no role in the development of the Nunez Plan, lining up the support of legislators and members of Congress for the plan, or in the crucial negotiations once the Governor threatened his veto and a compromise effort was undertaken. Representative Turnley said that the proposals of the Legislative Black Caucus never reported out of the Congressional reapportionment subcommittees. While the Legislative Black Caucus warmly endorsed the Nunez Plan, spoke out in favor of it and unaminously voted for it, the Caucus was simply not participate in its development and the efforts to get it passed.

As reported in the news reports, the key individual in the efforts to enact the Nunez Plan was not a member of the Jefferson Parish delegation, but Lawrence Chehardy, the Tax Assessor of Jefferson Parish. 16/ Mr. Chehardy said that his primary objective was the recognition of the population growth in Jefferson Parish, but he also supports what it would do for Orleans Parish and its minority community.

Aside from giving Jefferson Parish control of a Congressional district, the Nunez Plan would recognize divergent communities of interest. First, it would provide heavily black, urban New Orleans with a district, and also predominantly white, suburban Jefferson Parish with a district. Second, the Nunez Plan would be more faithful to the recognition of parish boundaries than the other plans. Third, it would also observe the natural geographic boundary of the Mississippi River.

16/ According to Governor Treen, Chehardy is the "political boss" of Jefferson Parish. Mr. Chehardy is the de facto leader of the Jefferson Parish Democratic political establishment and does not deny that he has substantial influence in the selection of candidates, but not necessarily their direct election.

The key point is the divergence of communities of interest. And there is agreement of the most prominent political leaders of the two parishes on this point of communities of interest, including Ernest Morial, the Mayor of New Orleans; Representative Louis Charbonnet, III, the only black legislative supporter of Governor Treen; Senator Samuel Nunez; and Jefferson Parish Assessor Lawrence Chehardy along with the other minority commenters, the Louisiana Survival Coalition, Representatives Jon Johnson and Johnny Jackson, Jr., and the Louisiana League of Women Voters.

New Orleans is urban, liberal and heavily black; Jefferson Parish is suburban, conservative and white. Their interests are often antagonistic. The commenters were quite candid in stating that many of the Jefferson Parish residents moved there from New Orleans to get away from living with blacks. The New Orleans metropolitan area, in their view, is no different from other American cities as an example of the phenomenon of "white flight." (New Orleans, Orleans Parish is the minority core (55% black) while the surrounding parishes are the white suburban ring, Jefferson, Plaquemines, St. Bernard and St. Tammany (all over 85% white).

The one example of lack of community of interest between Orleans and the surrounding parishes cited by the commenters from Mayor Morial to Senator Nunez is regional public transit. Public transit is actively supported by black and relatively poor New Orleans, but the surrounding parishes, such as Jefferson, is either indifferent or hostile to it. The commenters maintain that the blacks in New Orleans see public transit as an access to jobs outside the city, but many suburban residents see it as a threat because blacks will be able to come to their areas. Jefferson Parish would constitute 55.7% of the new Second District while Orleans Parish would only be 44.3%.

The commenters concluded that they do not see how a member of Congress in the Second Congressional District under the submitted plan could adequate serve two constituencies with diametrically opposed interests and needs. They believe that helping one would displease the other and that given the racial and parish makeup of the district, the urban and black interests in Orleans Parish would lose out to Jefferson Parish interests.

The local leaders point out that the Orleans portion of the Second District, containing the black community, is fully developed, and there is no room for population growth. But in Jefferson portion of the district on the West Bank of the Mississippi River, there is substantial on-going growth, which is solely white, suburban and upper middle income. What little black suburban growth in confined to Orleans Parish in the New Orleans East area of the Ninth Ward, which is located in the other district, the First Congressional

District. Thus, the 44.5% black population figure for the Second Congressional District would seem to be a maximum as white growth in Jefferson Parish continues, the black percentage will decline. (If the telephone conversation between Governor Treen and Congressman Breaux as discussed earlier is accurate, then clearly Governor Treen knew that there would be no potential for black growth in the Second District as submitted.) These observations are made by the Mayor of New Orleans and the Tax Assessor of Jefferson Parish, who are probably the most knowledgable officials on these condition.

Other issues are raised with Governor Treen's statements is his contention that "it is demeaning for blacks to suggest that they must be in an absolute majority in order to effect the election of a member of their race." 17/ Related to this is Governor Treen's statement on May 31, 1982 that to do so would pack the New Orleans black community into one district. Apparently, no minority leader agrees that the creation of a majority black Congressional district is "demeaning" for the black community in Louisiana.

The Louisiana Legislative Black Caucus has stated in its comment that the failure to create a majority black district and the enactment of the submitted plan intentionally dilutes black voting strength. Representative Turnley, the chairman of the Louisiana Legislative Black Caucus, has informed us that the Caucus is sending a letter signed by each black state legislator reaffirming the position against the submitted plan and in support of the Nunez Plan. Even the lone black legislative supporter of Governor Treen, Representative Louis Charbonnet, said that even though he is a Treen supporter, the submitted plan is a "racist" plan. Of the hundred or so letters from minority commenters, not one supports the submitted plan.

One organization, the Louisiana Survival Coalition, has even directly questioned the credibility of Governor Treen's position by referring to his past political history, which evidences in their view hostility to black interests. In its comment, the Coalition discussed Treen's participation in the Louisiana States Rights Party and provide campaign flyers of the States Rights Party for the 1960 presidential election. According to William Quigley, attorney for the Survival Coalition, this campaign

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17/ Governor Treen also reportedly stated that he was not opposed to the creation of a majority black district per se, but the particular configuration in the Nunez Plan. The fact is, as contemplated by the legislature, given the dispersal of black population in the state, the only possibility to draw a compact majority black district is in New Orleans.

literature was found in the States Rights Party file at the Public Library in New Orleans. Governor Treen's participation in the States Rights Party is also acknowledged in his authorized biography by Grover Rees, III.

In 1959, David Treen joined the States Rights Party of Louisiana. He served as the chairman of the party's central committee and ran as a presidential elector candidate in 1960. The main platform of the States Rights Party was preservation of racial segregation in the state and resistance to any federal effort to curtail segregation. Its leadership included the most notorious white supremacists in Louisiana, such as Judge Leander Perez of Plaquemines Parish, who was excommunicated from the Roman Catholic Church for his racist views, and State Senator William Rainach, the most prominent spokesman for racial segregation in the state legislature. Senator Rainach led efforts in the legislature for racially selective enforcement of Louisiana's literacy test requirement for voter registration. See Jack Bass and Walter DeVries, Transformation of Southern Politics (1977) at 162 and 166. Along with Judge Perez and Senator Rainach, David Treen was a candidate for presidential elector in 1960 on the States Rights ticket. (In fact, on the campaign flyer submitted by the Survival Coalition, Governor Treen's picture is sandwiched between the two men. The main theme of the flyer to "stop integration by federal force.")

In his authorized biography, Governor Treen explained that his interest in the States Rights Party was "idealistic" due to concern over what he believed was excessive federal intervention in state and local matters, contrary to the letter, if not, the spirit of the Tenth Amendment to the United States Constitution. Besides the cry to stop federal civil rights efforts by the federal judiciary and the Congress to desegregate Louisiana public schools and to require racial equality in employment and voting, the campaign flyer also raises legitimate concerns about the relationship between the federal government and the states, many of which are the subject of contemporary debate. But in the context of the history of the state and the period in which the statements were made, the main public appeal of the States Rights Party was clearly its campaign to resist laws for racial equality.

Governor Treen in his biography stated that he was disturbed with the racist tendencies, latent or otherwise, in the party and that he always believed that "all men are created equal" and that there should be equal application of the laws. 18/ Yet it is difficult to reconcile these beliefs with his prominent leadership in this party. Another flyer lists Governor Treen as a featured speaker at a "Rally to Save Segregation" with top billing given to Governor Ross Barnett of Mississippi and Judge Leander Perez and Senator William Rainach.

David Treen unsuccessfully attempted to run for Congress in the Second Congressional District against the late Hale Boggs, a southern Democratic liberal and formerly the majority whip of U.S. House of Representatives. Governor Treen ran three times against Congressman Boggs (1962, 1964 and 1968). In the 1964 and 1968, Treen's campaign platform was conservative, and one main plank was opposition to federal civil rights measures in voting, education and housing. See Treen Congressional campaign flyers in 1964 and 1968, Files of the Tulane University Library. 18/ In 1968, Treen almost defeated Boggs by running against the latter's support of federal civil rights legislation. However, the black community in New Orleans bloc voted for Boggs, and according to Governor Treen, the black vote provided the margin of victory. See Attachment A to Memorandum of David C. Treen to William J. Guste, Jr., Louisiana Attorney General, April 7, 1982.

While we are somewhat reluctant to probe the racial views of a particular individual, the issue has been raised. Because that individual, the Governor of Louisiana, played the key role in the adoption of the submitted Congressional reapportionment plan and the defeat of a plan which would have created a majority black district, but for his intervention, we believe that the inquiry is relevant to our review pursuant to Section 5. While

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18/ Also, in his biography, Governor Treen attempts to distinguish the States Rights Party of Louisiana from the States Rights Party of Alabama, which he considered a racist organization. It is difficult to draw this distinction because the States Rights Party movement was an effort to influence the presidential election of 1960 and as recognized on one of the supplied campaign flyers, was a cooperative venture between the States Rights Party organizations of the Deep South states.

19/ For example, there is a flyer in the 1968 Congressional campaign by "Democrats for [Presidential Candidate George Corley] Wallace and Treen," which claims that "THE WALLACE & TREEN PLATFORMS ARE THE SAME: 1-Return control of the schools to the state; 2-Repeal the open housing law; 3-Reconfirmation of the Supreme Court justices every 6 years . . ."

it may be distasteful to do so, we believe that an inference of racial motivation can be drawn from Governor Treen's background.

Additionally, a racial motivation to continue the division of the minority community in New Orleans, which could be a cohesive voting bloc to substantially influence, if not control, the election of a member of Congress in a New Orleans based district, may be inferred in the fact that Governor Treen was frustrated in two bids for Congress by the black vote in New Orleans. Governor Treen in the memorandum to Attorney General Guste further noted that the black vote proved decisive in defeating other Congressional candidates in 1976 and 1980. A cursory examination of election returns of the 1979 gubernatorial election reveals that the black community in New Orleans continued to bloc vote for his Democratic opponent.

The Louisiana Legislative Black Caucus also furnished a survey of Governor Treen's legislative record as a member of Congress, which was compiled by the Congressional Black Caucus indicating that he almost always voted against positions supported by the black community (assuming of course that the Congressional Black Caucus represents the black community). For example, in 1975, Congressman Treen voted against the extension of the Voting Rights Act of 1965.

With respect to the other assertions in Governor Treen's statement that "it is demeaning to blacks to suggest that they must be in an absolute majority in order to effect the election of their race. It is also demeaning to them to suggest that they will always vote along racial lines," Attachment A to Memorandum to Attorney General Guste at 3, there are further concerns raised. While it may be "demeaning" to suggest that blacks require a majority to elect someone of their choice, the reality in the State of Louisiana is that the statement is true. In our review of the 1981 Louisiana House of Representatives plan, in elections between 1972 and 1982 we found that no black had ever been elected in a district with less than 63.5% black population, though there had been many black candidates who have tried with less than that percentage.

The only black candidates who have been successful with less than that percentage have been in the City of New Orleans. Governor Treen and Martin Feldman, his special counsel, point to the fact that blacks have been elected citywide in New Orleans with 55% black population and 46% black registration (e.g., Ernest Morial as Mayor, Sidney Bartholomew as At-Large Councilman and Paul Valteau as Civil Sheriff). 20/ Even so, the returns of these 1982 elections in New Orleans still indicate that racially polarized voting still is prevalent there. 21/ See also, Beer v. United States, 374 F. Supp. 363, 375 (D.D.C. 1974), reversed on other grounds, 425 U.S. 130 (1976) (judicial findings of racial bloc voting in New Orleans).

While the record has shown that blacks can get elected in New Orleans with only 55% black population and slightly less than a majority in registered voters, there is no evidence that is the case outside of New Orleans, particularly in Jefferson Parish, which constitutes 55% of the new Second Congressional District. According to the views of the commenters, including the most prominent political figures in the area, Mayor Morial of New Orleans and Tax Assessor Chehardy of Jefferson Parish, the Second Congressional District will be controlled by Jefferson Parish and that it would be highly unlikely that a black would be elected in that Congressional district. At the May 31, 1982 conference with Mr. Reynolds, Governor Treen and Mr. Feldman relied on an analysis of racial voting patterns in the Orleans Parish portion of the Second District for the proposition that a black candidate could

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20/ Martin Feldman, Special Counsel to the Governor, in his memorandum to Mr. Reynolds asserted that in Taylor v. McKeithen, 499 F.2d 893 (5th Cir. 1974), the Fifth Circuit Court of Appeals explicitly recognized that blacks could be elected with less than 50% black population districts in the New Orleans area (presumably outside the city as well). Upon examination of the text of the Court's opinion, it was clear that the Fifth Circuit did not make such a proposition and in fact, the sole election contest where the black candidate was successful which the Fifth Circuit relied upon was in a state senatorial district entirely located within the City of New Orleans, which was 52% black population. After we brought this to Mr. Feldman's attention, he admitted that his proposition was erroneous. This is important because Governor Treen and Mr. Feldman believe that a black can win in the Second District under the submitted plan. In order to do so, a black candidate would have to obtain electoral support in 85% white Jefferson Parish. There is no evidence to suggest that this would be possible.

21/ Mr. Feldman at our request has furnished some information to support his proposition that there is considerable white support for black candidates in New Orleans. While he stated that the information came from the Louisiana State Planning Commission, we have not been able to verify the methodology or data relied upon.

be elected. After Mr. Reynolds asked if there had been a similar analysis for Jefferson Parish, they replied that it had not been done.

We later asked Mr. Feldman if an analysis of racial voting patterns of Jefferson Parish could be made. Mr. Feldman said that it could not be done because black candidates have not run there because "there is no substantial black population component there." The limited evidence we have suggest that there would be strong racial bloc voting in Jefferson Parish. Election returns of a 1979 election involving a black candidate for court of appeals judgeship in a multiparish district (including Jefferson and Orleans Parish) indicates a strong correlation between the black percentage of the Jefferson Parish voting precincts and the vote for black candidate. Furthermore, Lawrence Chehardy, the political leader of Jefferson Parish, noted that the only black official elected within the parish was a district court judge. In 1979, the black candidate approached Mr. Chehardy for his support, and Mr. Chehardy persuaded the other candidates for the position to withdraw from the race because Mr. Chehardy believed that he could not take the chance of having the black candidate run against white opposition.

In sum, Governor Treen questions the conclusion that blacks will always vote along racial lines, but our analysis reveals that while this may be the case, the problem is with white racial bloc voting.

Other serious issues raised by Mr. Feldman in his memorandum is whether the Nunez Plan would constitute racial maximization or proportional representation. It is clear that the Nunez Plan would not result in proportional representation. Under the 1980 Census, blacks constitute 29% of the State's population, and if the Nunez Plan were adopted, they might control one of eight Congressional districts, or only 12.5% of the representation. With respect to the maximization issue, it is true that one concern of the legislature was to enhance black voting strength in the Second Congressional District perhaps to a majority in black population, but the Nunez Plan adopted by the legislature also advance other legitimate governmental interests, such as population equality, preservation of like communities of interest, recognition of recent population trends (racial and nonracial) and observance of natural and political subdivision (parish) boundaries. Furthermore, there were other alternative plans which have been developed, including ones considered by the Congressional delegation, which would have enhanced minority population percentages even higher to almost 60%. (These proposals might have been less desirable because the districts in Jefferson and Orleans Parishes would straddle the Mississippi River unlike the Nunez Plan.)

The issue of Congressional reapportionment was in part whether to perpetuate the existing fragmentation of the New Orleans black community or not. Apparently, the legislature was resolved to eliminate that condition as the by-product of creating the Jefferson Parish district, but that was all changed.

Preservation of historical Congressional boundaries was also cited as a reason for the Governor's actions, i.e., New Orleans and Jefferson Parish have always been divided. Just because it has been so does not necessarily mean that there are no other legitimate reasons for changing boundaries. There are in our view valid reasons for the change to the Nunez Plan. First, the population growth in Jefferson Parish would be recognized as well as the population decline in Orleans Parish.

One reason advanced for the perpetuation of the division of Jefferson and Orleans Parishes is that it has always been done that way. This has been so because Orleans Parish with its large population dominated the area so it had to be split to meet "one-person, one-vote" requirements, but since the surrounding parishes have experienced tremendous population growth, Orleans Parish is no longer the dominant population area in the region. (It could even be said if the current population trends continue, not only would Orleans Parish not be dominant in the region, but it will be dominated by the surrounding parishes, particularly if the explosive growth in St. Tammany Parish continues.)

For the first time, there is near parity between Jefferson and Orleans Parish in population, and Congressional district lines could be drawn which would reflect parish identities and still meet population equality requirements. Moreover, as discussed earlier, such as a configuration as the Nunez Plan would recognize homogenous communities of interest.

We also note that if the Nunez Plan is adopted, St. Tammany Parish will be linked with the Florida Parishes in the Sixth Congressional District rather than with the New Orleans metropolitan area in the First District. We note that historically St. Tammany Parish was considered one of the Florida Parishes and did not become part of the First District until the 1960s.

The most serious concern raised by the creation of Jefferson Parish and Orleans Parish based districts would be the impact on two incumbents, Congresswoman Boggs and Congressman Livingston. Congresswoman Boggs said that she could win under the submitted plan, but also stated after the Nunez Plan was adopted by the House, that she had no problem with it. Congressman Livingston opposes the Nunez Plan and supports the submitted plan. Under the Nunez Plan, he would get a 75% new district, and the same would be true for Congresswoman Boggs. On one hand, it can be said that reapportionment have always been a hazard of the profession of politics, but on the other, Congressman Livingston's district required minimal alteration to achieve population equality. There would have been substantial shifts of population to eliminate the substantial population deviation among Congressional districts, and it would have been possible to achieve this without touching Congressman Livingston's district, but the legislature had decided that besides population equality and incumbency, there were other significant interests which it wanted to further by adopting the Nunez Plan.

Most commenters question whether the change would adversely impact on Congressman Livingston. They note that a First Congressional District based on the West Bank of Jefferson Parish would be more conservative than the district under both present and submitted plans. In Congressional reapportionment, the legislature analyzed two key races which indicated polarization between liberals and conservatives and whites and blacks, the 1979 gubernatorial general election between conservative Republican David Treen and liberal Democrat Louis Lambert and 1980 Presidental election between Ronald Reagan and Jimmy Carter. Under the Nunez Plan, the First District vote for Treen/Reagan was about 62% while under the present plan it was only 52% and under the submitted plan, it was 58%. The First District under the Nunez Plan would certainly be more attuned to the political philosophy of Congressman Livingston. 22/

Initially Congressman Livingston opposed the creation of a majority black district because it would draw the blacks out of his district and may just be race-conscious reapportionment. At one point in the Congressman Livingston reluctantly withdrew his opposition to the creation of a majority black Congressional district. But once the Governor stepped in which forced the compromise, Congressman Livingston renewed his opposition to the Nunez Plan, endorsed the submitted plan and induced the Governor to accept it.

22/ There was also a question of potential rivals in Jefferson Parish for Congressman Livingston's seat, such as Tax Assessor Chehardy and Senator Nunez. First, as for Mr. Chehardy, he would live in the Third District (Tauzin) under the Nunez Plan, not Congressman Livingston's district. Mr. Chehardy publicly offered to support Congressman Livingston in his reelection efforts and to run his campaign if requested (an unusual offer from the leader of the opposing party). Second, as for Senator Nunez, he already lives in Congressman Livingston's district and believes that the district as submitted would be more favorable to him if he ran for Congress than under his plan.

Related to the question of historical boundaries is the notion that New Orleans and its black community would be better served by being divided and having influence over two Congressional representatives. While this idea may have some appeal, black leaders have rejected it. In the areas of the State, where the possibility of additional Congressional representation through parish division has been suggested, it has been vociferously opposed by local political leaders, e.g., Rapides, East Baton Rouge and Jefferson Parishes.

Also, Governor Treen suggested at his November 9, 1981 news conference that black interests would be better served by having influence in two districts rather than a majority in one districts. No state black leader in or out of the Louisiana Legislature supports the Governor's view; in fact, black leaders uniformly and adamantly oppose that view. This would include Mayor Morial, Representative Turnley on behalf of the Legislative Black Caucus, and even the Governor's most steadfast black legislative supporter, Representative Charbonnet. Governor Treen and Mr. Feldman find support in a public statement of Mrs. Rupert Richardson, the president of the state N.A.A.C.P. 23/ In the quoted statement made in September 1981, Mrs. Richardson reportedly questioned the wisdom of a black majority district, if its creation would adversely impact on the two members of Congress who have been strong supporters of the black community, Lindy Boggs and Gillis Long. We note that she did not refer to Congressman Livingston, whose district along with Mrs. Boggs's is at the heart of this controversy. (Mrs. Richardson indicated to us that she did not believe that Congressman Livingston was a strong supporter of the black community.) We have been informed that Mrs. Richardson has submitted a statement in support of the position of the Legislative Black Caucus.

Governor Treen at the May 31, 1982 conference stated his opposition to the Nunez Plan on grounds that it would be a "power

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23/ Governor Treen and Mr. Feldman suggest that this statement demonstrates that the black community is divided on the question whether to create a majority black district. Mr. Feldman admitted that there were no other statements, which purportedly demonstrates such a division in the black community. It is somewhat questionable that this one isolated statement does question the creation of a majority black district under the Nunez Plan since that plan was not made public until the November special session.

play" on the behalf of the Jefferson Parish delegation to control a Congressional district (i.e., this would not be in the interests of "good government"). While this may evidence political considerations on the Governor's part 24/, the facts that the population growth in Jefferson Parish has been astronomic and the population of the parish is close to an ideal Congressional district (87%) indicates that the interest in creating a Jefferson Parish dominated district is legitimate.

There is some question that the Jefferson Parish Democratic political establishment may be able to control the outcome of elections in prominent election contests as indicated by the 1979 gubernatorial race electing David Treen and the 1980 presidential race electing Ronald Reagan. Jefferson Parish went about 2 to 1 for Treen and Reagan, the Republicans. This would seem to be so in Congressional races rather than lesser known state or local races where the general public would have less understanding of the duties of those offices. Governor Treen in his authorized biography noted that when he as the Republican candidate ran in Jefferson Parish for Congress, he exceeded all expectations, even surprising an unnamed Jefferson Parish political leader who thought that it was unprecedented for a candidate to get such electoral support in the parish. One could surmise that well-known and established member of Congress, such as Congressman Livingston, with similar views to Governor Treen would do equally well.

Mr. Feldman in his memorandum on behalf of the Governor maintains that the electoral strength of St. Bernard and Plaquemines Parishes would be diluted if there is a Jefferson Parish district. This argument is frivolous because those two parishes together are not heavily populated, constituting only 17% of a 1980 ideal Congressional district, while Jefferson would be 87% of a district.

24/ Ironically, Governor Treen's first successful bid for Congress in 1972 was probably assured by the support of the Jefferson Parish political establishment, a fact noted both by Governor Treen's authorized biography and by Tax Assessor Chehardy. Mr. Chehardy's father was then the Assessor and leader of the political establishment there. While Mr. Chehardy Sr. supported Hale Boggs over Treen in the Congressional elections in the 1960s. According to the current Assessor, Candidate Treen sought out Mr. Chehardy Sr. at the family home to discuss his candidacy. Because Mr. Chehardy Sr. saw Governor Treen as the "hometown boy" and someone of conscientious views would be as a candidate worthy of election, he decided not to actively oppose Treen, even over the objection of the then newly elected Democratic Governor Edwin Edwards, who supported the Democratic nominee.

At the May 31, 1982 conference and in the most recent letter from Governor Treen dated June 6, 1982, he cites the domino effect of the Nunez Plan as a reason for its rejection, i.e., the First Congressional District and East Baton Rouge Parish. With regard to the First District, the arguments have been addressed in that the legislature believed that there were other significant governmental interests which merited the shift. As to East Baton Rouge Parish, the legislature realized that the Nunez Plan creating the Orleans and Jefferson Parish based districts would have that effect. While a minority of legislators, notably the East Baton Rouge Parish delegation (but not all), opposed the division of the parish (and implicitly, the idea that two Congressional voices were better than one), the majority of both houses of the legislature finally passed legislation, which would have provided that split.

There is other evidence of the direct racial purpose of statements made by particular legislators, which are best left discussed in the confidential portion of this memorandum.

IV. CONCLUSION

While we conclude that the submitted Congressional reapportionment plan does not have a racially retrogressive effect within the meaning of Beer v. United States, this does not mean that the adoption of the submitted plan does not have racial consequences.

Both houses of the Louisiana Legislature finally passed legislation, the Nunez Plan, which would have provided for a 54.0% majority black district. It is the view of the legislators we talked to that the bill would have been enacted into law, but for Governor Treen's intervention. They said that a bill passed by both houses with only a minor variation would almost certainly become law.

The Governor has a key role in the legislative process as all legislation must meet his approval or a two-thirds vote must override his veto. According to the legislators, no gubernatorial veto has ever been overridden in Louisiana in recent history. One legislator said perhaps there was one in the 19th century. In Louisiana, there is a very strong executive. (I believe that this is a legacy of the Huey Long era.) There is a joke that in Louisiana, the two most powerful entity is first God and then, the Governor, and even that is debatable.

This Governor, though he initially downplayed his role for whatever reason, had the central role in the reapportionment process. He proposed his own reapportionment bills, used his veto power to achieve a desired objective and did not allow the enactment of a final plan unless it met his requirements.

When Governor Treen threatened his veto, he issued only a terse statement to that effect and did not specify his reasons. The rationale for his actions during the reapportionment process has come forth only slowly. While this may be understandable, given the sensitive political nature of the matter, it is difficult to ascertain what his motivation was at the time those actions occurred. His rationale has come forward in a piecemeal manner, and the reasons have differed, though not necessarily inconsistent with each other.

Before the reapportionment session began and shortly after the session closed, Governor Treen did make statements to justify the noninclusion of a black majority Congressional district. For example, he stated his belief that the creation of a black majority district is not constitutionally required, but also that it was not "a policy imperative." Apparently, the legislature had disagreed in adopting a plan which would create a black district. The Governor also stated his views that it would be in the best interests in the black community to have two so-called "influence districts" rather than one majority black district, i.e., "two Congressional voices." This is a position which contradicts what the black community in the state has expressed (and also, in other areas, where "influence districts" are proposed, there is strong opposition). Some in the black community questioned his credentials to speak on what is best for the black community because of his personal history which indicates advocacy of racial segregation in spite of his professions to the contrary. There is evidence which would tend to suggest that the continued fragmentation of the black community in New Orleans would be favorable to his political interests in light of the strong bloc vote against him in his Congressional and gubernatorial campaigns. From his memorandum to Louisiana Attorney General Guste, Governor Treen was clearly knowledgable about the black voting patterns in the area.

Governor Treen argues that the Second Congressional District under the submitted plan provides the black community with an opportunity to elect a candidate of its choice. But in light of the demographic and electoral patterns of the area, that is very, very unlikely. There has been no evidence offered that black voters will have the opportunity to elect a candidate of their choice in districts in which they are outnumbered by persons with antagonistic interests. It is one thing for Governor Treen to say that the voting patterns in more liberal New Orleans where there has been a history of some, but not necessarily substantial, white support for black candidates, it is altogether different to maintain this is so in the conservative suburban and heavily white parishes surrounding New Orleans. If the suburban white growth patterns in Jefferson and St. Tammany Parishes continue, this will mean that the voting strength of Orleans Parish with its significant minority community will weakened further.

While there may have been nonracial considerations in the Governor's deliberations, such as historical boundaries, dilution of voting strength of certain parishes, ripple effect, political rivalries, and incumbency preservation, and it is difficult to weigh them, even if inaccurate or frivolous, it is clear in our view that the Governor was acutely aware of the racial consequences of his actions, and those racial consideration formed the basis of his actions.

We conclude that the State has not met its burden of proving the lack of a racial purpose and recommend the interposition of a Section 5 objection.

CONFIDENTIAL PORTION OF SECTION 5 MEMORANDUM

Lawrence Chehardy, the Tax Assessor of Jefferson Parish, who was integrally involved in Congressional reapportionment as the leader of the Jefferson Parish political establishment and one of the architects of the Nunez Plan, alleged that Representative Charles Emile Bruneau of New Orleans told him at the time of the floor debates on Congressional reapportionment on November 5 or 6, 1981 that he is opposing the Jefferson/Nunez Plan because "We already have a nigger mayor [in New Orleans], and we don't need another nigger bigshot." Representative Bruneau was the chairman of the reapportionment subcommittee responsible for the objected-to Louisiana House of Representatives apportionment plan of 1981. He was also one of the six members of the joint conference committee which was responsible for developing a compromise plan after the Governor Treen's veto threat and the House reversal on the Nunez Plan. Representative Bruneau voted against the Nunez Plan in all votes and voted for the submitted plan. He played a prominent role in the adoption of amendments in the Committee on House and Governmental Affairs and on the House floor which would eliminate the Nunez Plan.

There were other racial considerations involved by other legislators in Mr. Chehardy's conversation. I am not sure what weight Mr. Chehardy's remarks are entitled to because he requested confidentiality. Representative Bruneau has not been confronted with these allegation; the confidentiality would be compromised if we were to do so.

Senator Thomas H. Hudson asked that certain of his remarks be kept confidential. He is the chairman of the Senate Reapportionment Study Group and was an opponent of the Nunez Plan. About the Governor's role in the Congressional reapportionment process, Senator Hudson said that "his presence was felt from the beginning and but for the Governor, that bill [i.e., the Nunez Plan] would have been passed."

EXHIBIT
48K

Memorandum

March 1, 1982

TO: File

FROM: Robert N. Kwan
Attorney
Voting Section

RE: Conference with Louisiana Senators Thomas H. Hudson and Samuel B. Nunez, Jr. on Louisiana Congressional and State Senate Reapportionment Submission, February 12, 1982

At the request of Louisiana State Senator Samuel B. Nunez, Jr., members of the Voting Section staff met with Senator Nunez and his colleague, Senator Thomas H. Hudson on the submission pursuant to Section 5 of the Voting Rights Act of 1965 of the 1981 plan of apportionment for the Louisiana Senate. The meeting took place in the office of Carl W. Gabel, Director, Section 5 Unit, Voting Section, in the HOLC Building on February 12, 1982 from 10:00 a.m. to 1:00 p.m. Attending the meeting for the Voting Section were Mr. Gabel and Robert N. Kwan and J. Gerald Hebert, Attorneys.

Senator Hudson identified himself as the chairman of the Louisiana Senate Reapportionment Committee, which was responsible for statewide reapportionment in the State Senate, and Senator Nunez as the vice chairman of the committee. (At the close of the meeting, Senator Nunez handed us a business card which indicated that he was president pro tempore of the Louisiana Senate.) Senator Hudson added that he was the chairman of the subcomitee on reapportionment of state senatorial districts and that Senator Nunez was the chairman of the subcommittee on Congressional reapportionment.

I told the Senators Hudson and Nunez that we would like to discuss both the Congressional and the State Senate plans as the two senators were substantially involved in the development of both plans now under Section 5 review. They agreed to discuss both plans. Senator Nunez remarked that he was the author of the Nunez plan, which would provide for a majority black Congressional district in Louisiana, but was eventually rejected under threat of gubernatorial veto.

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The discussion began with reapportionment of the Louisiana Senate. We indicated that the primary concern involved reapportionment of senatorial districts in the New Orleans metropolitan area.

Senator Hudson said that since he was the chairman of the subcommittee on senate reapportionment, he would explain that plan. He said that New Orleans not only failed to maintain the same rate of population growth as the state as a whole, but lost population. This necessitated the loss of 1.5 districts in New Orleans. In redrawing senatorial districts in the New Orleans area, the committee considered the following criteria: (1) traditional ward boundaries in New Orleans to avoid "disorientation"; (2) non-dilution of minority voting strength; (3) existing district boundaries; and (4) population growth in neighboring suburban parishes, i.e., Jefferson Parish and the "fast growing" Florida Parishes.

I asked Senator Hudson about proposals for a cross-river senatorial district combining the Algiers section of New Orleans on the "West Bank" of the Mississippi River with portions of the city on the "East Bank." He replied that there had been some federal court decisions cited by Senator Fritz Windhorst in favor of the proposition that Algiers is more aligned with Jefferson Parish. The senators said that Senator Windhorst threatened to bring suit if Algiers were combined with the rest of New Orleans across the Mississippi. Hudson said that there is a stronger bond between Algiers and Jefferson Parish than with New Orleans.

I said that under the new plan, there would be a decrease from four to three majority black districts in New Orleans and a decrease from three to two majority black registered voter districts there.

I asked Senator Hudson whether he agreed with the State's assertion that the loss of a black district in New Orleans would be offset by the possibility of two districts there (i.e., District 2 and 4) turning majority black in the near future. He replied that it is not likely that District 4 would turn majority black, but there is a possibility that District 2 would because it is currently 50% white and 50% black. Senator Hudson noted ironically that "the whites [incumbent Democratic senators] want more blacks [heavily Democratic voters] while blacks [incumbent senators] want more whites [to avoid heavily minority packed districts].

I asked Senator Hudson whether it would be possible to draw three minority controlled senatorial districts in New Orleans. He admitted that it would be possible, but had not done it on the computer. Informally speaking, he said that it could be probably done by pulling Algiers into a New Orleans senatorial district. He offered to develop such a plan on the State's computer when he returned to Baton Rouge.

Senator Hudson added that the two black incumbent state senators would involved in redistricting experimentation. One of them, Henry Braden, was on the Senate Reapportionment Study Committee. He noted that both black senators voted against the submitted plan. Senators Hudson and Nunez said that this was because of the Desire housing project, a heavily black public housing project placed in the district of one of the incumbent black senators. They said that the reason for the opposition was non-racial because one of the incumbent black senators did not want the housing project because of a potential rival for his office (i.e., Representative Johnny Jackson). They also pointed out that another black legislator, Representative Jon Johnson testified in opposition to amendments offered by the black senators on the issue.

We next discussed Congressional reapportionment in Louisiana. I asked how the Senate and House versions of a reapportionment bill which created a majority black district were different. Senators Hudson and Nunez said that the two plans were basically the same but for a minor difference involving one voting precinct. They said the reason why the bill did not pass was because of Governor Treen's opposition.

I asked what was the basis of Governor Treen's opposition. They said that at first, the Governor had said that there was no responsibility of the State to create a black district, but later, the Governor merely stated that he had a concern about Jefferson Parish.

Senator Nunez said that the bill with a majority black district was passed by the Senate first and then the House passed a version. He said that the votes were close, and that due to the Governor's opposition, there would have to be some compromise. Senator Nunez suggested that we could best understand the full story behind the changes by requesting tape recordings of the House-Senate conference committee meetings on Congressional reapportionment.

I asked how important preservation of parish boundaries. Senator Nunez said that it was important to preserve these lines where possible.

I requested Senator Hudson to discuss consultation with the Louisiana Congressional delegation on redistricting. He said that the House and Senate reapportionment committee wrote a joint letter to the members of the Congressional delegation for recommendations. The Congressional delegation responded by submitting its own plan. The essence of the plan was a minor adjustment of the existing districts to bring the plan within tolerable population limits. Congressman Tauzin had presented this plan at a meeting between the Congressional delegation and the House and Senate reapportionment committees. The House and Senate reapportionment committees commented on the Congressional delegation plan by identifying certain concerns: (1) the desirability of a majority black district and (2) an interest to avoid a continued division of Jefferson Parish. The state legislature wanted to recognize the rapid population growth in Jefferson, Plaquemines and St. Bernard Parishes and the large minority community in the state.

Senator Nunez proposed his plan, which he believed got a consensus support from the Congressional delegation. He said that probably five members of Congress would accept the plan while two would oppose. He said that the Congressional delegation felt that the blacks should get a Congressional district.

Senator Nunez said that Governor Treen presented four plans to the House and Senate reapportionment committees, but these efforts alienated the Congressional delegation because they were too "partisan."

He added that one problem of both the old and the new plans was that Jefferson Parish would be divided by three districts. Under the Nunez plan, Jefferson Parish would be undivided.

Senator Nunez contended that Republicans would fare better under his plan than the adopted plan. Under the Nunez plan, the First District would be more conservative than it would be under the adopted plan. The First District under the Nunez plan would be primarily Jefferson Parish, which is more philosophically attuned to Congressman Livingston, a conservative Republican. He noted that Governor Treen in 1979 and President Reagan in 1980 ran better in Jefferson Parish than in other area parishes. Senator Nunez added that his plan would benefit both Orleans and Jefferson Parishes because Orleans would dominate one district and Jefferson would be able to dominate one.

Senator Nunez said that the opposition to the Nunez plan was really a matter of opposition to change per se (and the uncertainty it brings) rather than the results of the plan.

In defense of his plan, he added that it would better observe the natural boundaries of the area, i.e., Lake Pontchartrain and the Mississippi River. Furthermore, th Nunez Plan was a "non-partisan" plan as it was not designed to harm incumbent Congressmen. He said that the leaders of the three parishes in the area supported the Nunez Plan. Congresswoman Boggs also supported the plan.

But Governor Treen publicly threatened a veto, and time was running out in the special legislative session. If the Governor vetoed the plan, it would be somewhat questionable whether there would be enough votes for an override. Thus, if the Nunez Plan went forward, the Governor would have interposed the veto and another special session would have been required to resolve the reapportionment problem. In the meantime, the Congressional delegation would have felt much uncertainty over their districts. Finally, under heavy Congressional pressure to adopt a plan, a last minute deal was struck to avoid the veto. The compromise plan watered down the Second District in terms of minority voting strength, but Nunez believes that it was the only plan which would pass at the time. Nunez believes that the two Congressional districts in the area will be dominated by Jefferson Parish, and probably the persons who will be elected will be those who would represent that parish's interests.

Senator Hudson said that the legislature finally acted to adopt a compromise because it felt that the public expected a Congressional plan at the end of the special session and that it was not right to keep the members of Congressional delegation in uncertainty over their districts.

Hudson and Nunez said that the Second District will be 60% Jefferson Parish, and this will influence the incumbent, Mrs. Boggs, because she will have to be more responsive to a conservative, suburban area. They believe that Mrs. Boggs will be re-elected because her husband had strong political support in Jefferson Parish, but for probably only another term. The black community is really her political base, and in prior years, she had lost her portion of Jefferson Parish by a vote of 2 to 1.

They termed the First District as a white, "silk stocking" district comprised of Plaquemines, St. Bernard and St. Tammany Parishes as well as Orleans. Those other parishes have no concern for inner city Orleans Parish as those are "white flight" areas, where whites are moving to avoid living in racially integrated New Orleans. This district does not need the support of the black community to win, and it will go down.

Senator Nunez pointed out that there is little community of interest between the urban areas in New Orleans and the suburban and even rural areas in Jefferson and St. Bernard Parishes. For example, a important issue in New Orleans is money for public transportation, but in St. Bernard Parish, there is no interest in this.

Senator Nunez added that he introduced proposed Act No. 20, or the Nunez bill. He noted that there was much more involvement in Congressional reapportionment on the Governor's part than in House or Senate reapportionment. The Governor did not support the Nunez Plan, nor did Congressmen Henson Moore or Bob Livingston.

I asked Senator Nunez about the Senate plan again. About the Algiers section of New Orleans, he said that it was an old part of town, racially mixed, middle class, more suburban, and more spread out than New Orleans. In other words, he says, more akin to Jefferson Parish. The Ninth Ward directly across the River is divided by a levee (i.e., the Industrial Canal), which separates into the Upper and Lower Ninth Ward.

I asked them about Senate District 4 in New Orleans as to whether it would turn majority black. Both Hudson and Nunez agreed that even though it is now 48% black, it is not likely to turn majority black.

The Governor had a major presence in the reapportionment process by presenting his own plans and by public threat of a veto. Nunez and Hudson said that the public statement threatening was in fact a veto. About the meetings to work out a Congressional compromise plan, Nunez said that representatives of the Governor were present at the Capitol Basement meetings to devise a compromise plan, and they are John Cade of the Governor's staff and Bob Livingston who is considered a Treen ally. They noted that representatives of the Congressional delegation were present at these sessions.

I asked them if there were other persons that we may contact to fill us in on the reapportionment process. They suggested Candice Lee, a reporter for the New Orleans Morning Advocate, and Jack Wardlaw, a reporter for the New Orleans Times-Picayune.

In summing up, Nunez and Hudson agreed that it would be fair to say that racial considerations played a role in Congressional reapportionment. The Governor opposed the majority black Congressional district because he thought it was not needed. It is likely that both Districts 1 and 2 will be dominated by middle class, white and conservative Jefferson Parish and that the persons elected in those districts will be white and conservative. Nunez added that his plan was the most natural because it recognized both natural geographic features and different communities of interest in New Orleans and Jefferson Parish. Senator Nunez finally commented that the Nunez reapportionment bill would have been enacted, but for the Governor's public threat of veto, and if called on the stand, he would have to say that he told this to the Governor.

Senator Hudson said that opposition to the Nunez Plan was not racism per se for Governor Treen. There was a concern over the change of District 1. Despite the lack of communities of interest, Treen insisted on keeping New Orleans and Jefferson Parish divided, and thus, since the growing suburban parishes will dominate, the urban interests of New Orleans will not be represented in these districts.

Senator SIMON. Thank you.
Mr. John England.

STATEMENT OF JOHN ENGLAND

Mr. ENGLAND. My name is John England, and I am an attorney representing a small county in Alabama. The name of the county is Greene County. It happens to contain a population of about 11,000 folks of whom approximately 78 percent are black.

I am here to talk about one particular case, *Morris Hardy* v. *Greene County Racing Commission.* [*Hardy* v. *Wallace,* 603 F. Supp. 174 (N.D. Ala. 1985).]

Greene County has one large employer. That is the racing commission which runs a dog track. The racing commission has been set up by legislation giving it the power to oversee, regulate, and license greyhound racing and betting. For fiscal year 1984, the commission generated about 63 percent of the county's revenue and also employed a substantial portion of the county's population.

Prior to a 1983 reapportionment plan which made it possible for blacks to be elected to the Alabama House and Senate, the selection and oversight of the racing commission was invested in the local legislative delegation, which was white. The white local legislative delegation responded to the possibility of black membership by gaining the enactment of bill No. 507, which removed control of the racing commission from the local legislative delegation—which was going to be black—to the Governor, George Wallace. This action was taken primarily to ensure that the control over the racing commission would not rest in the hands of a black legislative delegation.

The Justice Department initially saw the very obvious racial discrimination involved in these actions and interposed an objection to the change brought about by act No. 507. However, after receiving political pressure from the white power structure in Greene County and the State of Alabama, the Justice Department withdrew its objection. In doing so, it sanctioned the act's removal of power from the local legislative delegation to the Governor.

The reason for such action is obvious. In effect, the Justice Department found that the act was not subject to preclearence, because it did not constitute a change in the standard voting practices or procedure which would require compliance with section 5 of the Voting Rights Act. This made it necessary for local black citizens to go before a three judge court to obtain a court ruling that the change had a clear discriminatory potential and therefore was subject to section 5.

I simply wanted to raise the point that a Justice Department to which citizens in Greene County have traditionally looked for assistance in challenging acts made by a legislature hostile to the interest of blacks no longer exists. It is now necessary for us to go to court to achieve that which we thought the Justice Department was there to do. That is the reason why I'm here. I will answer any questions you may have.

Senator SIMON. Thank you very much, Mr. England. Mrs. Foster, I gather, is not here right now. Frank Parker.

STATEMENT OF FRANK R. PARKER

Mr. PARKER. Good afternoon, Mr. Chairman, members of the committee. I am Frank Parker, director of the voting rights project of the Lawyers' Committee for Civil Rights Under Law. I have been handling voting rights cases since 1970. And since 1981 I have devoted myself exclusively to voting rights litigation.

I have submitted a written statement and I will be grateful if that written statement could be included in the record.

Senator SIMON. It will be, as will all statements.

Mr. PARKER. I would like to devote my short, 5-minute period to correcting some errors which I heard in testimony of Mr. Reynolds yesterday.

Mr. Reynolds testified that after the 1980 census, the Civil Rights Division almost singlehandedly went about the business of ensuring comprehensive redistricting plans in a way that is most advantageous to minority populations throughout the South, and that this led to increased political participation. This is only partly true.

It is true that the Civil Rights Division did object to a number of racially discriminatory redistricting plans, but section 5 operates only in a negative way, not a positive way. In order to get the local jurisdictions to adopt new plans which were nondiscriminatory which remedied the section 5 objections, it was necessary to file lawsuits. And almost all of the lawsuits that were filed in the South to follow up on these section 5 objections were filed by private groups and individuals.

One example of this is the Mississippi cases. In the Mississippi cases, staff of the Civil Rights Division recommended to Mr. Reynolds that he file a number of county redistricting cases in Mississippi to follow up on section 5 objections. Mr. Reynolds rejected those recommendations.

Mr. Reynolds said there were two instances in which courts have disagreed with the decision of the Attorney General in not objecting under section 5. That figure is wrong. There are five instances in which courts have handed down decisions striking down redistricting plans which have been approved: *Major* v. *Treen, Gingles* v. *Edminsten Busky* v. *Oliver, Nestiy* v. *Commissioners Court of Jefferson County, Texas,* and *Hardy* v. *Wallace.*

Mr. Reynolds testified that the Justice Department has filed 26 section 2 lawsuits as part of a, quote, "strenuous enforcement effort," and 9 others, in which the Justice Department has intervened to defend the constitutionality of section 2.

I have prepared a list of Justice Department cases. The total number of section 2 cases filed by the Justice Department is 10.

Senator METZENBAUM [presiding]. Compared to what number?

Mr. PARKER. Twenty-six. There were six additional cases in which the Justice Department intervened in private suits to enforce section 2. And among those 10, 3 were cases that had previously been filed by private plaintiffs. So in terms of new cases by the Justice Department on its own, there were only seven. There were six cases in which the Justice Department intervened on behalf of private plaintiffs to litigate the merits. And there were nine cases in which the Justice Department intervened for the limited purpose of defending the constitutionality of section 2 but not to litigate the merits.

And I ask that this list be included in the record.

Senator **Metzenbaum**. Without objection so ordered.

Mr. **Parker**. Mr. Reynolds said there were 30 instances in which there was a difference of opinion between him and his staff over whether a voting law change should be objected to under section 5. I would simply like to point out—and I believe this is true although I do not have access to these documents—in all 30 instances the staff recommended an objection, and Mr. Reynolds did not agree with that recommendation and did not enter an objection in that case.

Let me point out one of the problems we have in these cases is that there is no appeal from a decision by the Attorney General not to object to a particular voting law change or redistricting plan. If the Attorney General does object, then the local jurisdiction has an appeal to D.C. district court to overturn the objection. If the Attorney General fails to object, there is no appeal. And this is what makes this type of situation extremely difficult.

In the Mississippi cases, Mr. Reynolds said that he talked to the private lawyers, and they all agreed that the Justice Department should not file these 11 or 13, however many they are, Mississippi county redistricting cases. Senator, I represented the parties in seven of these lawsuits. I never heard from Mr. Reynolds.

I never agreed that the Justice Department should not file these Mississippi county redistricting cases. Because the Justice Department failed to act, private groups and individuals had to file over 29 county redistricting cases in Mississippi and spend thousands of dollars, perhaps hundreds of thousands of dollars, to do the job of the Justice Department.

My final point is that Mr. Reynolds said that he had entered 266 objections to voting law changes from January 1981 to the present time. That is incorrect. There were 164 objections to voting law changes, 164 objections to submissions, which included a total perhaps of 266 changes. But the number of objections was only 164.

I see my time is up, Senator.

[Information follows:]

STATEMENT OF
FRANK R. PARKER
DIRECTOR, VOTING RIGHTS PROJECT
LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW
WASHINGTON, D.C.

Mr. Chairman and members of the Committee, I appreciate the opportunity to appear here today to testify in opposition to the nomination of William Bradford Reynolds as Associate Attorney General.

I have been litigating cases in the voting rights area since 1970, first in Mississippi, where from 1968 to 1981 I was a staff attorney and then Chief Counsel of the Lawyers' Committee's Mississippi Office, and then since 1981 in my present position as Director of the Lawyers' Committee's Voting Rights Project.

Since 1981 I have devoted my time almost exclusively to voting rights litigation around the country. In the past four years alone I have handled approximately 30 voting rights cases, including the Mississippi congressional redistricting cases, the Virginia state legislative reapportionment case, challenges to at-large county and city elections, litigation involving county and city redistricting plans, and challenges to discriminatory voter registration procedures. I have also written extensively on voting rights. I wrote the chapter on Legislative Reapportionment in the recently-published book, Minority Vote Dilution (C. Davidson, ed., Howard University Press: 1984), have published articles on voting rights in the Virginia Law Review, the Mississippi Law Journal, and the George Mason University Law Review, and have published three litigation manuals on voting rights litigation. As a result of my work, for the past 15 years I have closely monitored Justice Department policies in the voting rights area.

The right to vote is fundamental to our democratic society. Almost 100 years ago, the Supreme Court termed the right to vote "a fundamental political right, because preservative of all rights" (Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886)). "Other rights," the Supreme Court has held, "even the most basic, are illusory if the right to vote is undermined" (Wesberry v. Sanders, 376 U.S. 1, 17 (1964)).

Despite the fundamental importance of the right to vote, Mr. Reynolds as Assistant Attorney General for civil rights has adopted policies and taken positions which have failed to protect, and which have undermined, the right to vote. He has opposed voting rights legislation designed to strengthen the statutory protections for minority voting rights, he has defaulted in numerous instances in his sworn duty to enforce statutory voting rights protections, and he has placed his imprimatur on racially discriminatory redistricting plans and other discriminatory voting law changes which diluted minority voting strength.

Mr. Reynolds' nomination as Associate Attorney General should be rejected, and his record on nonenforcement of voting rights should be condemned, not rewarded. The statistics on lawsuits filed and Section 5 objections he cites should not be permitted to mask the fact that Mr. Reynolds' administration of the Civil Rights Division has been characterized to an unprecedented degree by nonenforcement, by retreats, and by submissions to political interference in the voting rights area.

I have not been given an opportunity to review the internal Justice Department files on voting rights and I am not privy to internal Justice Department decision-making. However, based on my research of public records, press reports, and my knowledge of cases with which I am familiar, here are fifteen examples of the policies and positions of Mr. Reynolds as Assistant Attorney General in the voting area which are so grossly opposed to the effective enforcement of minority voting rights as to disqualify Mr. Reynolds from serving as Associate Attorney General.

I.

1. Opposition to legislation strengthening the Voting Rights Act. In 1980 in City of Mobile v. Bolden, 446 U.S. 55, the Supreme Court dealt a crippling blow to efforts to eliminate discriminatory barriers to minority political participation when it ruled that plaintiffs in voting rights cases brought under the

Fourteenth and Fifteenth Amendments and Section 2 of the Voting Rights Act must prove discriminatory intent. The Mobile decision evoked a torrent of criticism in the civil rights, legal, and academic communities. The Harvard Law Review severely criticized the decision and concluded that efforts to counter minority vote dilution had "suffered a serious setback." Note, The Supreme Court, 1979 Term, 94 Harv. L. Rev. 75, 149 (1980).

Legislation was introduced in Congress to amend Section 2 of the Voting Rights Act to nullify the impact of the Mobile decision. The purpose of the proposed Section 2 "results" test was to restore the legal standard which prevailed prior to the Mobile decision under which the validity of a challenged voting law would be judged on the "totality of the circumstances," focusing on the result and consequences of the challenged law, rather than on the intent or motivation behind it. Although this legislation was reported out favorably by this Committee, and was passed overwhelmingly by both houses of Congress, Mr. Reynolds vigorously opposed its adoption and testified against it in Senate hearings. In his testimony Mr. Reynolds strongly supported retention of the Mobile intent standard, despite the fact that this standard established an extremely difficult burden for voting rights plaintiffs (including the Department of Justice) to meet. Voting Rights Act: Hearings before the Subcommittee on the Constitution of the Senate Committee on the Judiciary, 97th Cong. 2d Sess., Vol. 1, 1659-64 (1982).

2. Failure to enforce Section 2. After the 1982 amendment to Section 2 of the Voting Rights Act was passed by Congress over his vigorous opposition, Mr. Reynolds did little to enforce it. Despite publicity given to the creation of a new "Section 2 unit" in the Voting Section of the Civil Rights Division, the Department did not file any new Section 2 lawsuits of its own for approximately a year and a half after the new statute was passed (excluding interventions in private suits and amicus curiae

briefs).

Altogether, since the Act was amended, Mr. Reynolds has filed only ten new Section 2 lawsuits of his own (excluding interventions in other cases and *amicus curiae* participation) -- four in October and November of 1983, four in 1984, and two in January, 1985.[1] We now seem to be experiencing a new wave of Section 2 nonenforcement; since January of this year Mr. Reynolds has not filed any new Section 2 cases of his own. Since he took office Mr. Reynolds has not filed any new Section 2 cases of his own in Virginia, South Carolina, Mississippi, Louisiana, or Texas -- all states covered by the Voting Rights Act where there are still numerous barriers to equal minority political participation.

This dismal record should be contrasted with the fact that private groups and individuals have filed, and continue to file, scores of Section 2 lawsuits around the country challenging discriminatory congressional and legislative redistricting plans, discriminatory at-large county and city election systems, and gerrymandered county and city redistricting plans.

3. *Failure to protect voting rights in Mississippi.* In the summer of 1983 Mr. Reynolds went on a highly-publicized tour of Mississippi with Rev. Jesse Jackson, joined hands with black community leaders and sang "We Shall Overcome," and promised to protect black voting rights with a "war on discrimination." After this tour, according to press reports, attorneys in the Voting Section of the Civil Rights Division presented him with eleven new lawsuits to follow up on Section 5 objections lodged against new discriminatory county redistricting plans and to

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[1] Mr. Reynolds' statistics count eleven new Section 2 lawsuits of his own. This is because the District Court divided one new lawsuit, *United States* v. *Chaves County* (D.N. Mex. filed Jan. 10, 1985), into two separate cases. But the Justice Department filed only one complaint in this case.

Since January, 1981, the Justice Department also has intervened in only six Section 2 lawsuits filed by private plaintiffs to litigate the merits (the Justice Department counts eight because the Chicago city redistricting case was three consolidated lawsuits). Mr. Reynolds has intervened or otherwise appeared at the District Court level exclusively to defend the constitutionality of Section 2, but not to litigate the merits, in nine additional cases.

challenge malapportioned and discriminatory election district lines. However, despite his promise to protect minority voting rights in Mississippi, Reynolds vetoed the filing of ten of these eleven lawsuits, and authorized the filing of only one complaint -- which was not a Section 2 case but a Section 5 enforcement action -- challenging new justice of the peace districts in tiny, sparsely-populated Lawrence County (population 12,518). _USA Today_, October 17, 1983, p. 8A; (Jackson) _Clarion-Ledger_, October 17, 1983, p. 1A. Mr. Reynolds did authorize Justice Department attorneys to file _amicus curiae_ briefs in two additional cases, but in those briefs the Justice Department suggested that the District Courts should permit the county elections to proceed under malapportioned and discriminatory county redistricting plans, which undercut the relief requested by the private plaintiffs in those cases to enjoin the elections until new, nondiscriminatory plans were approved.

Altogether, the sum total of Mr. Reynolds' "war on discrimination" in Mississippi at the District Court level has been to intervene in two private Section 2 lawsuits challenging at-large city elections, to file two Section 5 enforcement lawsuits to enjoin unprecleared voting law changes, and to file _amicus curiae_ briefs in two county redistricting cases. In contrast, private groups and individuals in Mississippi have filed more than 25 county redistricting suits seeking fair and nondiscriminatory election district lines (most of which have been successful) and have litigated or are litigating more than 22 Section 2 lawsuits challenging discriminatory at-large city council elections (many of which also have been successful; most are still pending decision).

The tragedy is that as a result of Mr. Reynolds failure to protect the voting rights of black voters in Mississippi, the enormous burden of enforcement has fallen to private groups, such as the Lawyers' Committee, and private individuals who lack the financial and personnel resources available to the Department of Justice to litigate these cases.

II.

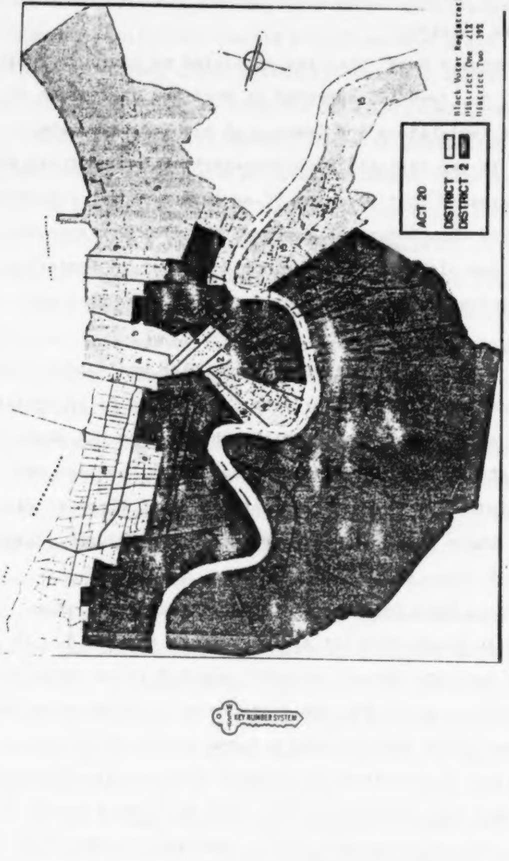
Section 5 of the Voting Rights Act requires nine states and parts of 13 others to submit all voting law changes for Federal preclearance by the Attorney General or the District Court in Washington. The submitting state or political subdivision has the burden of proving that these changes are not discriminatory in purpose or effect. The Attorney General has delegated his Section 5 preclearance authority to the Assistant Attorney General in charge of the Civil Rights Division, and if the Assistant Attorney General approves a change, there is no appeal by aggrieved parties. Aggrieved parties may file a lawsuit in local District Court challenging the change on constitutional or statutory grounds, but in such cases the private plaintiffs have the burden of proof and success is diminished by the simple fact that the plan already has passed Section 5 muster.

In a number of instances, Mr. Reynolds has acted to approve, under Section 5 of the Voting Rights Act, racially discriminatory voting law changes which subsequently were challenged in Federal court and found to violate the Voting Rights Act or were withdrawn by local officials to settle private lawsuits filed against them.

4. The Louisiana congressional redistricting case. In 1982 the Louisiana Legislature adopted a discriminatory new congressional redistricting plan which fragmented black voting strength. The districts were so contorted in shape that one of them resembled a duck, hence the name "Donald Duck" district. A map showing the boundaries of the "Donald Duck" district is included herein.

Before the "Donald Duck" plan was adopted, both houses of the Louisiana Legislature passed a plan, the Nunez plan, which would have created a 54 percent black New Orleans district. But then-Louisiana Governor David Treen threatened to veto this plan because it created a majority black district, and the Nunez plan

APPENDIX C


ACT 20
DISTRICT 1 □
DISTRICT 2 ■
Black Voter Registration
District One 41%
District Two 39%
15
2

was shelved. The "Donald Duck" plan was conceived in a secret meeting in a sub-basement of the State Capitol from which all black legislators were excluded and created two majority white districts in New Orleans.

When the "Donald Duck" plan was submitted to him for Section 5 preclearance, Mr. Reynolds approved it over the objections of black Louisiana legislators and members of his own staff who contended that it was racially discriminatory in both purpose and effect. I understand that Governor Treen is a personal friend of Mr. Reynolds, and that before he approved the plan Mr. Reynolds spent at least one night in the Governor's Mansion in Louisiana and conferred privately with Governor Treen, but not with any black leaders.

After Mr. Reynolds determined that the plan was nondiscriminatory in purpose and effect, a private lawsuit was filed against Governor Treen and other state officials challenging the plan. A three-judge District Court unanimously found that the plan was racially discriminatory and violated the rights of black voters protected by Section 2 of the Voting Rights Act. *Major* v. *Treen*, 574 F. Supp. 325 (E.D. La. 1983).

5. *The North Carolina legislative reapportionment case*. Forty counties in North Carolina are covered by Section 5. In 1981 the North Carolina General Assembly enacted state legislative reapportionment plans for the state House of Representatives and state Senate which incorporated a large number of multi-member legislative districts which diluted black voting strength in countywide and multi-county voting. The plan was adopted pursuant to a 1968 state constitutional provision which prohibited dividing counties in legislative reapportionment. In 1981 and 1982 the Justice Department objected to the 1968 prohibition on breaking county lines and to the 1981 redistricting plans for the House and Senate.

In 1982 the General Assembly enacted revised House and Senate redistricting plans in response to these Section 5 objections. In the Section 5-covered areas, these new plans included House District 8 and Senate District 2. House District

8 was a large, multi-member district composed of three counties and electing four House members. Although there were black population concentrations within those three counties which if placed together would have created a 62.7 percent black single-member district, black voting strength was submerged by combining all three counties together in a large multi-member district which was only 39.5 percent black in population and 29.5 percent black in registered voters. Senate District 2 was created in an area containing a sufficient number of black persons to establish a single-member Senate district which would have been 60.7 percent black in population and 51.02 percent black in registered voters. Instead, the state legislature gerrymandered the lines of this district to create a large multi-county single-member district which was only 46.2 percent black in registered voters.

Despite these facts showing that these districts severely diluted black voting strength, Mr. Reynolds granted Section 5 approval to the revised plan on April 30, 1982. Black voters who had filed a lawsuit in 1981 attacking the original plans amended their pleadings to challenge five House districts and two Senate districts, including House District 8 and Senate District 2 which Mr. Reynolds had precleared, for unlawful dilution of black voting strength. A three-judge District Court sustained their claims, finding that all of the challenged districts "diluted the voting strength of black citizens either by submerging or by fracturing concentrations of black voters . . . " in violation of Section 2 of the Voting Rights Act. Gingles v. Edmisten, 590 F. Supp. 345, 377 (E.D.N.C. 1984), prob. juris. noted, 53 U.S.L.W. 3776 (U.S. April 29, 1985).

6. The Montgomery, Alabama, city redistricting plan. Montgomery is divided into nine city council districts, five of which are predominantly white and have been represented by white council members and four of which are heavily black and have been represented by black council members. In 1981, by a split five-to-four vote, the city council adopted a new city redistricting plan. The new plan was a modification of a plan

proposed by Montgomery Mayor Emory Folmar. It generally maintained the pre-existing percentages of the white districts but reduced the black percentage of the district represented by a black council member, Joe Reed (District 3), by 16.2 percentage points -- from 84.2 percent to 68 percent. Mayor Folmar's original plan would have reduced the black percentage in Reed's district by 22.7 percentage points, and contemporary statements by Mayor Folmar showed that his plan was designed to diminish the likelihood that Reed would be reelected but still withstand a court challenge.

When the plan was first submitted for Section 5 review, Mr. Reynolds on January 5, 1982 lodged an objection based on retrogression of black voting strength. The city requested reconsideration of the objection. According to reports Mr. Reynolds held a number of telephone conversations with Mayor Folmar and on February 23, 1982 withdrew the objection.

In a private lawsuit challenging the plan as violative of Section 2 of the Voting Rights Act, the District Court held that the plan violated the Voting Rights Act because of its retrogressive effect and because it was "purposefully designed and executed to decrease the voting strength of the black electorate in district 3." Buskey v. Oliver, 565 F. Supp. 1473, 1483 (M.D. Ala. 1983).

7. The Jefferson County, Texas, redistricting plan. Jefferson County, Texas, is divided into four commissioners precincts for the election of members of the county Commissioners Court. Despite the fact that the county is 28.2 percent black, no black candidate has succeeded in getting elected to the county governing body in recent times. In 1981 the county Commissioners Court adopted a county redistricting plan which divided a heavy black population concentration in the City of Beaumont almost equally between two commissioners precincts, which were 36.6

percent black and 40.4 percent black, thus diluting black voting strength and denying black voters any opportunity to elect candidates of their choice. When the plan was submitted for Section 5 review, Mr. Reynolds approved it.

In a subsequent lawsuit by two black Beaumont voters, the District Court found on the totality of the circumstances that black voters were denied equal access to the political process in Jefferson County by the redistricting plan in violation of Section 2. Nisby v. Commissioners Court of Jefferson County, Civil No. B-83-342-CA (E.D. Tex. August 14, 1984).

8. The Scott County, Mississippi, redistricting plan. Although Scott County is 35 percent black, since 1965 the boundaries of the county's five supervisors' districts, which serve as election districts for the members of the county board of supervisors, have been gerrymandered to prevent the election of any blacks to county government. In 1983 the Scott County Board of Supervisors adopted a new county redistricting plan, and Mr. Reynolds objected to the plan pursuant to Section 5 because it fragmented black population concentrations in the City of Forest, the county seat, among several irregularly-shaped districts.

A private lawsuit, Stowers v. Scott County Board of Supervisors, was filed, and the District Court enjoined the upcoming 1983 county supevisors elections and ordered the county board to devise a new plan. The new plan retained many of the discriminatory features of the old plan, but increased the black percentage of one district to 55 percent of the total district population. This district, however, was only 50.4 percent black in voting age population and effectively denied black voters, whose registration rates are disproportionately low, any opportunity of electing candidates of their choice.

Despite objections from black voters that the revised plan was still discriminatory, Mr. Reynolds granted Section 5 approval to the revised plan. The private plaintiffs then challenged the plan for Section 2 violations. After the first day of trial the county board of supervisors agreed to repeal the

Reynolds-approved plan and to adopt a new plan which eliminated the gerrymandering of the prior plan and which created a new supervisors' district which was approximately 64 percent black in population and 59 percent black in voting age population. In a special election held in March, 1984, the first black supervisor in Scott County since Reconstruction was elected in the new majority-black district, an event which never would have occurred if the plan approved by Mr. Reynolds had remained in effect.

9. *The Petersburg, Virginia, city redistricting plan*. The City of Petersburg, which is 61 percent black but which has a white city council majority, in 1981 adopted a city redistricting plan which diminished the black percentages of wards represented by black city council members. Mr. Reynolds rejected this plan under Section 5. The city council then adopted a new plan which satisfied the first objections, but which unnecessarily diminished the black percentage of another ward, Ward 7, from 59 percent to 56 percent. Despite objections from black Petersburg voters, the Virginia ACLU, and the Lawyers' Committee, Mr. Reynolds approved this new plan. As a result of the new Ward 7 boundaries, which removed approximately 300 black voters from Ward 7, a popular black candidate lost the city council election in that ward by 56 votes.

Black Petersburg voters then filed *Cunningham* v. *City of Petersburg*, which was a private lawsuit challenging the new plan for Section 2 violations. On the first day of trial, the white city council majority agreed to abandon this plan and to restore the black percentage of Ward 7 to its pre-existing level.

These examples of Mr. Reynolds approving racially discriminatory voting law changes under Section 5 of the Voting Rights Act are not the results of inadvertence or judgment calls about which there can be substantial differences of opinion. These are instances in which aggrieved black voters, civil rights organizations, and I believe, members of the staff of the Civil Rights Division pointed out the discriminatory features of these changes and showed that they violated the Voting Rights Act. In four instances Federal District Courts made up of Southern Federal judges found that these changes were racially discriminatory and violative of the rights of minority voters secured by the Voting Rights Act. In two other instances, the proof was so overwhelming that the covered jurisdictions agreed to abandon the very plans approved by Mr. Reynolds at trial.

In the Section 5 submission process, the rules are clear. The Section 5-covered jurisdiction has the burden of proof of showing that the proposed change in not discriminatory in purpose or effect. Justice Department regulations provide that if the jurisdiction cannot meet its burden, or if the evidence is conflicting, the Assistant Attorney General has a duty to object. See 28 C.F.R. § 51.39. If an objection is lodged, and the covered jurisdiction desires to contest it, it may file a Section 5 declaratory judgment action in the District Court in Washington to obtain court preclearance of the change. By not objecting to these discriminatory voting law changes, Mr. Reynolds abdicated his statutory responsibility to protect minority voting rights from infringement.

In addition, I believe that the records of the Civil Rights Division will show that in at least two instances, the Louisiana congressional redistricting case and the Montgomery, Alabama, city redistricting case, Mr. Reynolds either approved the new plan or withdrew a Section 5 objection after conferring with the very perpetrators of the discrimination who were found in subsequent court decisions to be responsible for the violation of minority voting rights.

10. The Greene County, Alabama, Racing Commission. There is yet another example of Mr. Reynolds abdicating his Section 5 enforcement responsibilities. In 1984 Mr. Reynolds lodged a Section 5 objection to a change in the method of selection of the members of the Greene County Racing Commission. Greene County is 78 percent black, and 63 percent of the county's total revenues

come from receipts at the dog racing track. Since 1976 members of the racing commission had been appointed by the county's all-white state legislative delegation. After completion of the 1983 Alabama legislative reapportionment case which resulted in Greene County being placed in predominantly black state House and Senate districts, thus increasing the likelihood that black legislators might replace the previously-white county legislative delegation (two black legislators subsequently were elected), the Alabama Legislature enacted a statute transferring the appointment power from the county legislative delegation to the Governor. Mr. Reynolds initially objected to this change on facts showing that it was racially discriminatory in both purpose and effect. Section 5 objection letter, June 18, 1984.

According to reports, local white Alabama politicians then met with Mr. Reynolds and requested a reconsideration of the Section 5 objection. Four months after the objection was interposed, Mr. Reynolds withdrew the objection, and contrary to a D.C. District Court decision in a Section 5 case (Horry County v. United States, 449 F. Supp. 990, 995 (D.D.C. 1978)) determined that the change was not even covered by Section 5.

In a subsequent lawsuit seeking an injunction against the change for lack of Section 5 preclearance, a three-judge District Court rejected Mr. Reynolds' position, determined that the Horry County decision was controlling, and enjoined implementation of the change until it had been properly reviewed under Section 5. Hardy v. Wallace, 603 F. Supp. 174 (N.D. Ala. 1985).

III.

Mr. Reynolds' publicly-expressed antipathy to the provisions of the 1982 amendment to Section 2 of the Voting Rights Act and his inadequate enforcement policies have led him to take retrogressive positions in voting rights litigation and to refuse to act in critical situations when effective action was required, which have opposed and severely undermined the effective enforcement of constitutional and statutory voting rights guarantees.

11. Thornburg v. Gingles. In April of this year, Mr. Reynolds approved a Justice Department brief filed in the

United States Supreme Court making arguments which, if accepted by the Court, could severely limit the statutory protections of Section 2 for minority voters. Thornburg v. Gingles (U.S. No. 83-1968) is the appeal by North Carolina state officials of the District Court decision striking down seven districts in the state legislative reapportionment plan for Section 2 violations (see Gingles v. Edmisten, supra). In this appeal, in a dramatic reversal of its traditional posture, the Justice Department has turned its back on the Section 2 claims of minority voters to align itself with a Section 5-covered state and to argue that District Court findings of racial discrimination and dilution of minority voting strength should be reversed.

In this case the District Court made detailed findings which analyzed all aspects of the electoral process in North Carolina and the challenged districts and concluded, based on the totality of the circumstances, that the challenged districts violated the Section 2 rights of black voters. In its brief, the Justice Department severely distorts the legislative history of Section 2, ignores most of the detailed findings of fact by the District Court showing that black voters are severely disadvantaged in the challenged districts, and contends that the District Court "equated the legal standard of Section 2 with one of guaranteed electoral success in proportion to the black percentage of the population" (Brief, p. 12) -- a proposition which the District Court specifically disavowed in its decision (590 F. Supp. at 355).

12. Ketchum v. Byrne. In the recent Chicago, Illinois, city redistricting case, black and Hispanic voters filed a lawsuit challenging a city redistricting plan that dispersed minority communities, reduced the number of majority black wards from 19 to 17, and minimized and canceled out Hispanic voting strength. After the private suit was filed, the Justice Department intervened on the side of the private plaintiffs. The District Court invalidated the challenged plan for Section 2 violations, but approved a new plan that minority voters contended failed to remedy the violations completely.

The private plaintiffs appealed, but Mr. Reynolds overruled the recommendation of his staff attorneys and refused to permit the Justice Department to join in the appeal. The United States Court of Appeals for the Seventh Circuit agreed with the contentions of the private plaintiffs, reversed the District Court's approval of the new plan, and sent the case back to the District Court for reconsideration of more effective remedies that would give black voters better opportunities to gain representation of their choice in the challenged districts. *Ketchum* v. *Byrne*, 740 F.2d 1398 (7th Cir. 1984), *cert. denied*, No. 84-627 (U.S. June 3, 1985).

When city officials petitioned the United States Supreme Court for certiorari (*City Council of Chicago* v. *Ketchum*, No. 84-627), Mr. Reynolds approved a brief filed on behalf of the Justice Department last month which supported many of the arguments of the city officials, opposed much of the relief requested by the minority voters, and expressed "serious reservations" regarding the Court of Appeals' instructions to the District Court to reevaluate its remedial plan to insure that the new remedy provides effective opportunities for minority voters to elect candidates of their choice. The Justice Department's position as expressed in this brief is contrary to the holdings of numerous courts in vote dilution cases and is seriously detrimental to the enforcement of minority voting rights.

13. *Blanding* v. *DuBose*. Sumter County, South Carolina, in 1976 adopted pursuant to a new state law a new form of county government under which the county would be governed by a seven-member county council, with all seven members elected in at-large voting. Because Sumter County is 56 percent white and only 44 percent black, countywide elections dilute black voting strength and make it more difficult for black voters to gain representation of their choice in county government.

In 1976 the change was submitted to the Attorney General, and a Section 5 objection was lodged. Black voters and the Justice Department then brought separate Section 5 enforcement actions, and a three-judge District Court enjoined at-large county council elections unless and until they had been precleared. In 1978 the county held a referendum on whether county council members should be elected at-large or by district, and a majority of the voters endorsed the at-large system. The county then transmitted the results of this referendum to the Justice Department. The Justice Department treated this letter as a request for reconsideration of the 1976 objection and wrote to the county twice refusing to withdraw the objection.

A three-judge District Court ruled that the county's transmittal of the 1978 referendum results was a new Section 5 submission of a voting law change, and that the failure of the Justice Department to enter a new Section 5 objection within 60 days of receipt of the county's letter meant that the county was free to implement the referendum approving at-large elections. Blanding v. DuBose, 509 F. Supp. 1334 (D.S.C. 1981).

Although the District Court rejected the position taken by the Justice Department in this case, Mr. Reynolds decided not to appeal the decision.

The private plaintiffs did appeal, however, and under Supreme Court rules the Justice Department was required to file a brief anyway, in which it adhered to its original position. On appeal, the United States Supreme Court summarily and unanimously reversed the District Court's decision, holding that the county's transmittal of the referendum results was a request for reconsideration of the earlier Section 5 objection and not a new Section 5 submission to which a new, redundant Section 5 objection was required. Blanding v. DuBose, 454 U.S. 393 (1982).

14. McCain v. Lybrand. The South Carolina Legislature in 1966 enacted a statute changing Edgefield County, South Carolina's form of county government to a three-member county council, with all three members elected at-large. At-large elections cancel out black voting strength in Edgefield County. Although the county is 52 percent black in population, it is majority white in voting age population and registered voters, and despite the county's substantial black population no black person has been elected to the county council in at-large

voting. Despite the dilutive impact of at-large elections for the Sumter County Council, the 1966 statute was never submitted for Section 5 preclearance.

In 1971 the state legislature amended the 1966 statute to increase the number of county council members to five. This 1971 statute was submitted to the Justice Department pursuant to Section 5 and no objection was interposed.

Black voters of Sumter County filed suit challenging the at-large election system for unlawful dilution of black voting strength and alleged in supplemental pleadings that the at-large system was being implemented in violation of Section 5 because the 1966 law had never been precleared. The county contended that the 1966 statute had been precleared when the 1971 statute was approved because the 1966 statute had been brought to the Justice Department's attention at that time.

According to press reports, Mr. Reynolds authorized his staff to file an _amicus curiae_ in the District Court in support of the contentions of the black voters that at-large county elections violated Section 5. I understand that a brief was written and transmitted to the Justice Department's office in South Carolina for filing. Then, within 24 hours, just before the case was scheduled to be heard by a three-judge District Court in South Carolina, Mr. Reynolds reversed himself and ordered that the brief not be filed. _Richmond Times-Dispatch_, September 13, 1981, p. A14; Columbia, S.C., _State_, September 14, 1981.

Mr. Reynolds confirmed to reporters that he had changed his mind on the basis of "new information," but refused to disclose the source of that information. A spokesman for Senator Strom Thurmond, who was born in Edgefield County and began his political career there, admitted that Senator Thurmond had discussed the case with Mr. Reynolds but denied that the senator had applied "any pressure on the Justice Department." _Id_. The attorney for the private plaintiffs, Laughlin McDonald of the ACLU, told reporters that it would have been "enormously helpful for somebody from the Justice Department to affirm their position that the use of at-large voting had never been pre-cleared." Id.

In the absence of Justice Department participation, the three-judge District Court in South Carolina rejected the black voters' position and ruled that the at-large election system had been precleared. McCain v. Lybrand, Civil No. 74-281 (D.S.C. May 10, 1982). The plaintiffs appealed to the United States Supreme Court. As part of this appeal, the Supreme Court specifically requested the Justice Department to file a brief, 459 U.S. 903 (1983), and the Department did file a brief supporting reversal. In 1984 the Supreme Court unanimously reversed the District Court's decision, holding that the 1966 statute had never been properly submitted for Section 5 preclearance. McCain v. Lybrand, 104 S.Ct. 1037 (1984).

15. Rogers v. Lodge. This case, which was decided by the Supreme Court in 1982, was one of the most important voting rights cases to reach the Supreme Court since City of Mobile v. Bolden, 446 U.S. 55 (1980), in which the Supreme Court first specifically held that plaintiffs in voting cases brought under the Fourteenth Amendment were required to prove discriminatory intent.

This lawsuit was a challenge to at-large county commissioner elections in Burke County, Georgia. Black voters alleged that at-large elections unlawfully diluted black voting strength. Although the county was 52 percent black in population, whites made up a majority of the voting age population and blacks constituted only 38 percent of the registered voters. No black person had ever been elected to the Burke County county commission.

Both the District Court and the United States Court of Appeals for the Fifth Circuit held that at-large elections diluted black voting strength and, although there was no direct evidence of discriminatory intent, ruled on the basis of circumstantial proof that at-large voting had been maintained for a racially discriminatory purpose in violation of the Fourteenth Amendment. Lodge v. Buxton, 639 F.2d 1358 (5th Cir. 1981).

In the Fifth Circuit appeal, the Justice Department filed a lengthy amicus curiae brief in support of the black voter plaintiffs.

When the case reached the Supreme Court on an appeal by county officials, however, Mr. Reynolds reversed the Justice Department's position and refused to approve the filing of a brief on behalf of the Justice Department. I do not know precisely why Mr. Reynolds ordered this reversal of position. Perhaps he thought that the black voter plaintiffs should lose the case. Nevertheless, by a vote of six to three, the Supreme Court affirmed the Fifth Circuit's decision. Rogers v. Lodge, 458 U.S. 613 (1982).

These are only examples in which in voting rights litigation Mr. Reynolds has taken positions which oppose the effective enforcement of the Voting Rights Act and constitutional voting rights and in which he has failed to perform his duty to enforce the Act's provisions. I have not attempted to catalogue all the instances in which Mr. Reynolds has taken positions adverse to the voting rights of minority voters.

Mr. Reynolds' repeated failures to enforce the Voting Rights Act have very serious implications. The Voting Rights Act itself expressly places primary responsibility for its enforcement on the Attorney General and the Justice Department. Section 12(d) of the Act, 42 U.S.C. § 1973j(d), expressly authorizes only the Attorney General to file suit to redress violations of the Act's provisions (courts have implied a right of action on behalf of aggrieved minority voters, although the Act does not specifically by its terms authorize private suits). When the Assistant Attorney General for civil rights acting on behalf of the Attorney General fails in litigation to enforce the Act's provisions, as Mr. Reynolds has, it not only represents a failure to perform a statutory duty under the Voting Rights Act, but undermines the Act's entire enforcement scheme as well as the voting rights of minority Americans.

In each of these cases Mr. Reynolds has taken positions in litigation which were contrary to the rulings of the lower

Federal courts which sustained the claims of minority voters (Thornburg v. Gingles and City Council of Chicago v. Ketchum) or has failed to take the enforcement action required to protect minority voting rights, whether by failing to appeal an adverse District Court decision or by failing to file a brief in support of the minority voters (Blanding v. DuBose, McCain v. Lybrand, Rogers v. Lodge). In the last three cases, the Supreme Court ultimately sustained the minority voters' claims and ruled that the rights of minority voters had been violated, despite the fact that Mr. Reynolds failed to act when enforcement action was required.

I have given you fifteen reasons in the voting rights area why Mr. Reynolds should not be confirmed. On the basis of this dismal record, this Committee should vote to reject Mr. Reynolds' confirmation as Associate Attorney General.

Senator METZENBAUM. Will you submit for the record in tabular form what Reynolds said that he had done and what your analysis indicates he had done.

Mr. PARKER. I'd be happy to do that, Senator. Because there were two other points that I wanted to cover, the *Petersburg* case and the new Justice Department regulations that because of the time limitation I am unable to cover.

Senator METZENBAUM. Robert Dinerstein, acting director of the Criminal Justice Clinic.

STATEMENT OF ROBERT D. DINERSTEIN

Mr. DINERSTEIN. Mr. Chairman, members of the committee, my name is Robert D. Dinerstein. I am here today to testify in opposition to the nomination of William Bradford Reynolds.

I have been asked to testify on behalf of a number of organizations. These include the Epilepsy Foundation of America, National Easter Seals Foundation, National Society——

Senator METZENBAUM. Mr. Dinerstein, what you are saying is important enough to slow it down even if you say a little bit less. So slow it down.

Mr. DINERSTEIN. National Society for Children and Adults with Autism, the National Association of Protection and Advocacy Systems, Disabilities Rights, Education Defense Fund, and the Center for Law and Policy.

By way of introduction, I am a clinical lecturer at the American Washington University College of Law. I teach a seminar on the rights of institutionalized persons. From 1977 to 1982 I was an attorney in the Department of Justice's Civil Rights Division.

My focus today is on the degree to which the Civil Rights Division has retreated in a number of significant respects from its historic role as protector of the rights of disabled persons. The first instance of that is in the Department's enforcement of the Civil

Rights of Institutionalized Persons Act, or CRIPA. Yesterday Mr. Reynolds testified that his division's enforcement of this act is truly remarkable. I believe it is remarkably poor. Since the enactment of that statute in 1980, the division has intervened in only one mental disability case and initiated only three others.

Mr. Reynolds has justified this inactivity by pointing to the number of investigations initiated and by arguing that Congress passage of CRIPA reflected its dissatisfaction with litigation as a tool for enforcing institutionalized persons' rights. This argument is at first blush plausible, but on examination cannot be sustained.

First, many of the investigations initiated by the division have languished for months and even years. As a result dangerous, life-threatening conditions remain. Anybody that realizes how serious these conditions are realizes too, unfortunately, that they continue to persist.

Second, the legislative history of CRIPA simply does not support the idea that its passage was motivated by pervasive dissatisfaction with litigation. In fact, Congress was responding to court decisions that had held that the Department did not have authority to sue absent specific congressional authorization.

Congress praised previous administrations' efforts to ameliorate those conditions. But Congress included language in CRIPA directing the Attorney General to attempt to negotiate and conciliate with the responsible State officials prior to filing suit. That period of negotiation was deemed to run at least 49 days. The Department, however, has interpreted that to run years. Indeed in one case just filed recently, over 4 years elapsed between initiation of the investigation and filing of the consent decree.

Mr. Reynolds has elevated this modest limitation on the Attorney General's right to sue into the main thrust of the entire statute.

The second major area in which Mr. Reynolds has failed to enforce the rights of disabled persons is in his interpretation of the significance of the Supreme Court case of *Youngberg* v. *Romca*. In that case in 1982 for the first time the Supreme Court held that involuntarily committed mentally retarded persons had substantive due process rights to safety, freedom from bodily restraint, and the training necessary to serve these rights.

The Court did not reach the broader questions of whether the plaintiff had a right to training per se or whether in some instances the mere fact of being institutionalized might so affect a person's rights that he would need training to be able to effectuate his rights.

Yet Mr. Reynolds used that case as an example and vehicle for being able to cut back on rights of institutionalized persons. Just 6 days after the decision, he wrote a memorandum explaining the significance of the case in his judgment, to the section that I was a part of. He concluded that the Department would only seek to enforce those rights explicitly recognized in Youngberg, but would not pursue matters not addressed by the opinion.

Among other things he concluded that no longer would the Department examine the adequacy of psychiatric or psychological care, idleness or the possibility that institutionalization itself might be an undue infringement upon a person's liberty interests.

The few cases Mr. Reynolds has filed and investigations reflect excessively narrow interpretations of this significant case. I might add that that narrow interpretation of the case is in stark contrast to his efforts to pursue the *Stotts* case that we have been hearing about in these last 2 days of testimony.

The third general area in which I would like to discuss Mr. Reynolds' activities concerns his reversals of position in historic cases that the division has been involved in. The *Wyatt* case which is a—I would just indicate that cases like the *Wyatt* case, the *Pennhurst* case in Pennsylvania, the *Atascadero* case pending before the Supreme Court, the *Georgia ARC* case concerning section 504 and ultimately—although this is not a reversal of position—a brief filed in the Supreme Court in the *Cleburne* case in which he argued against the position of the fifth circuit which had held that mentally retarded people would constitute a quasi suspect class.

These cases demonstrate his inability or unwillingness to follow the mandates of the constitution and the statutes he has to uphold. For these reasons, I oppose his nomination. Thank you.

Senator **Metzenbaum**. I want to be clear on one point. You indicated as I understand it that you are testifying on behalf of a number of organizations, and, as I understand it, testifying in opposition to confirmation of William Bradford Reynolds. What are those organizations?

Mr. **Dinerstein**. They are the Epilepsy Foundation of America, the National Easter Seals Foundation, the National Society for Children and Adults with Autism, National Association of Protection and Advocacy Systems, Disability Rights, Education, and Defense Fund, Inc., and the Center for Law and Social Policy.

Senator **Metzenbaum**. Thank you very much.

Can you tell me, Mr. Dinerstein, in what manner have you been authorized to speak for those groups? You say you are speaking for the National Easter Seals group. Have they sent you a letter?

Mr. **Dinerstein**. No, Senator, they have not. These are all through oral communications.

Senator **Metzenbaum**. I think that the committee would be well served, and your purposes would be well served, if you could get a letter confirming the fact that your testimony was on behalf of each of those organizations, or in the alternative, a letter from those organizations directed to the chairman of the committee and a copy to the ranking minority member indicating that they are opposed to confirmation.

I say this because you are talking about some rather well-known national organizations. I want you to understand I am not questioning your integrity or your statements that you are making. But I just want to be certain that if there is debate on the floor of the Senate and we use something of that kind, that there not be any possibility of contradiction.

Mr. **Dinerstein**. Certainly I will do that.

[The following was subsequently supplied for the record:]

THE AMERICAN UNIVERSITY
WASHINGTON DC

June 13, 1985

Senator Strom Thurmond
Chairman, Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Re: Nomination Hearing of Wm. Bradford Reynolds, June 5, 1985

Dear Senator Thurmond:

During my testimony before the Committee on the nomination of Wm. Bradford Reynolds for Associate Attorney General, Senator Metzenbaum requested that I submit letters from the various organizations on whose behalf I testified confirming their authorization of my testimony and its opposition to Mr. Reynolds's nomination. Accordingly, enclosed herewith are letters from the Epilepsy Foundation of America, National Easter Seal Society, The National Society for Children and Adults with Autism, National Association of Protection and Advocacy Systems, Disability Rights Education and Defense Fund, Inc., and Center for Law and Social Policy.

Sincerely,
Robert D Dinerstein

Robert D. Dinerstein
Clinical Lecturer and
Acting Director
Criminal Justice Clinic

Enclosures
cc: Senator Joseph Biden

®
Epilepsy
FOUNDATION OF AMERICA

June 7, 1985

Robert Dinerstein, Acting Director
Criminal Justice Clinic
Washington College of Law
American University
Washington, D.C. 20016

Dear Mr. Dinerstein:

I am writing to you about your testimony before the Senate Judiciary Committee opposing the confirmation of William Bradford Reynolds to the position of Associate Attorney General. The Epilepsy Foundation of America would like you to testify on its behalf. Please inform the members of the Senate Judiciary Committee that you have been authorized by the Foundation to testify on our behalf.

Sincerely,

Richard Nugent
Director, Government Liaison

national
easter seal society
OVER 60 YEARS OF SERVICE TO INDIVIDUALS WITH DISABILITIES

Office of Governmental Affairs

June 3, 1985

Mr. Robert Dinerstein
Acting Director
Criminal Justice Clinic
Washington College of Law
American University
Washington, D.C. 20016

Dear Mr. Dinerstein:

We would appreciate your testifying on behalf of the National Easter Seal Society in opposition to William Bradford Reynolds' confirmation as Associate Attorney General before the Senate Judiciary Committee.

Sincerely,

Joseph D. Romer

Joseph D. Romer
Director of Governmental
Affairs

JDR:cg

NAPAS *National Association of Protection & Advocacy Systems*

Ethan B Ellis, President
N J Department of the
Public Advocate
Hughes Justice Complex
Trenton, NJ 08625

Mary Anne Harvey, V President
Colorado

Lois Simpson, V President
Louisiana

I Eliot J Dober
Connecticut

II Juan Rivera
Puerto Rico

III Yetta Galiber
District of Columbia

IV Lockhart Follin-Mace
North Carolina

V Zena Naiditch
Illinois

VI James Jackson
New Mexico

VII Richard Heiser
Missouri

VIII Phyllis Geldzahler
Utah

IX Albert Zonca
California

X Elam Lantz
Oregon

June 7, 1985

Robert Dimerstein, Acting Director
Criminal Justice Clinic
Washington College of Law
American University
Washington, DC 20016

Dear Mr. Dinerstein

The National Association of Protection and Advocacy Systems, Inc. (NAPAS) has spoken to you concerning your testimony regarding the appointment of William Bradford Reynolds as Associate Attorney General.

NAPAS is in agreement with the information presented and authorize you to speak in its behalf.

Very truly yours,

Curtis L. Decker, J.D.
Consultant

CLD:js

DREDF
Disability Rights Education and Defense Fund, Inc.

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PUBLIC POLICY,
TRAINING AND
TECHNICAL
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(202) 659-4884
(voice or TDD)

7 June 1985

Robert Dinerstein, Acting Director
Criminal Justice Clinic
Washington College of Law
American University
Washington, DC 20016

Dear Mr. Dinerstein:

Pursuant to our conversations with you about your testimony opposing the confirmation of William Bradford Reynolds to the position of Associate Attorney General, the Disability Rights Education Defense Fund authorizes you to testify on our organization's behalf. We would appreciate your conveying that information to the Chair and members of the Senate Judiciary Committee.

Very truly yours,

Patrisha Wright

NSAC
The National Society
for Children and Adults with Autism

SUITE 1017, 1234 MASSACHUSETTS AVENUE, N.W. WASHINGTON, DC 20005-4599 (202) 783-0125

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Luke Watson, Ph.D. (Hon.)
Lorna Wing, M.D. (Hon.)

EXECUTIVE DIRECTOR

Roy Morgan

INFORMATION AND REFERRAL

(202) 783-0125

June 7, 1985

Robert Dinerstein
Acting Director
Criminal Justice Clinic
Washington College of Law
American University
Washington, D.C. 20016

Dear Mr. Dinerstein:

By this letter you are authorized to testify on behalf of the National Society for Children and Adults with Autism in opposition to the confirmation of William Bradford Reynolds to the position of Associate Attorney General. This letter formalizes our previous understanding. Please convey this information on our behalf to the Chair and members of the Senate Judiciary Committee.

Sincerely,

Roy Morgan

Roy Morgan
Executive Director

CENTER
FOR
LAW
AND
SOCIAL
POLICY

7 June 1985

Robert Dinerstein, Acting Director
Criminal Justice Clinic
Washington College of Law
American University
Washington, DC 20016

Dear Bob:

Thank you for having sent me a copy of your testimony, opposing the nomination of William Bradford Reynolds to the position of Associate Attorney General. The testimony accurately reflects our review of Mr. Reynolds' work in the Section 504 and Civil Rights of Institutionalized Persons' Act. Therefore, we would appreciate your informing the members of the Senate Judiciary Committee that the Center for Law and Social Policy authorizes you to testify on our behalf.

Sincerely,

Bonnie

Bonnie Milstein
Senior Staff Attorney

BM/nll

READEX
FICHE

Senator **Metzenbaum**. Our next witness is Marianne Becker, former Homeward Bound president from Tulsa, OK.

STATEMENT OF MARIANNE BECKER

Ms. **Becker**. Yes. I am Marianne Becker. I am a parent of two multiply handicapped children who are residents of an institution for the retarded called Hissom Memorial Center in Oklahoma. And I also am here in opposition to Mr. Reynolds' confirmation.

Senator **Metzenbaum**. What was that group?

Ms. **Becker**. I am also a member of Homeward Bound, which is an advocacy organization in Oklahoma. It is primarily engaged in promoting services in the community for persons who are retarded with some little success up to now.

Most of the members of Homeward Bound are parents like myself who due to the lack of community services in Oklahoma have had to place their children at Hissom Memorial Center, which as I said, is a school or institution for the retarded.

For some time now parents have been reporting serious problems at this institution. I will give you some examples of what I mean by serious problems. One of the parents of a child out there who is a member of our organization, he comes home from Hissom on the weekends with injuries that are not explained, bruises, primarily, that appear to be human bites. They have not been able to get any explanation of where these bruises came from.

I was asked by a member of Homeward Bound to accompany her to the hospital about a year ago to meet her son, who was being transported from Hissom. When we arrived there, he arrived at the hospital about the same time in a coma, near death, from serious dehydration, with a deep acid burn on one side of his face from lying in his own vomit.

He had apparently, from records at Hissom, been sick for a long time before they transported him. And the medical staff there treated this boy who was seriously dehydrated with enemas and laxatives.

Other examples of seriously inadequate medical care include the fact that there is a doctor who practiced medicine in Hissom for a considerable period of time and never went to medical school. He practiced medicine about how you would expect someone to practice medicine that had not been to medical school. The officials knew about the question of this man's credentials for some time before they investigated or let him go.

Those are some examples. Another that we were aware of was a drowning death that was reported in Oklahoma newspapers. Homeward Bound and parents brought these problems to the attention of State officials repeatedly without very much in the way of results.

And at that point we began to ask advocacy organizations in other States what we should do now. What they told us was that in the past what we could do would be to ask for help from the Justice Department. And other advocacy organizations, such as associations for retarded citizens had filed suit in federal court, civil rights class actions cases, and the Justice Department had intervened on behalf of the rights of the residents of state institutions.

But this had not been done for a number of years due to the policies of Mr. Reynolds, and we could not expect help from that quarter.

We were not surprised to hear this because one of the Oklahoma newspapers that reported on the drowning death of the young man at Hissom reported that the Justice Department had been asked to investigate unofficially apparently by State officials in Oklahoma after that death, and that Mr. Reynolds' staff also recommended an investigation at Hissom. But Mr. Reynolds said, according to the newspaper article, that if he had ten deaths he'd consider that a serious problem but one he did not consider a serious problem.

Therefore, we did not expect help from that quarter and began to search for attorneys to represent us in order to bring a civil rights class action suit on behalf of our children.

Senator **Biden**. Excuse me. Did you ask for the help?

Ms. **Becker**. Not directly at that point, no, we did not.

Senator **Metzenbaum**. You said you had some other claims?

Ms. **Becker**. We asked for help just before we had found representation. And what the advocacy organizations in other States recommended was that if we had found representation in order to file our own suit, that we not pursue help from the Justice Department because what they had done in other cases was sign consent decrees that were not going to really ameliorate the problems.

And we, having found representation, went ahead and pursued that course of action, based on the idea that if one death was not enough, we really didn't want to wait for more in order for that to be considered serious enough.

Senator **Biden**. Excuse me. But in your personal experience you have not had an encounter with the Justice Department personally that has not been to your satisfaction, have you, because you have not gone to the Justice Department? You listened to advocacy groups in other States saying "do not go to Justice, they are no good, they are not going to do it, you better do it privately?"

Ms. **Becker**. No, not quite. We did talk to the Justice Department. To various staff members there, a couple of staff members there——

Senator **Biden**. At what stage?

Ms. **Becker** [continuing]. Who said that they could take some information from us, but it had to be extremely serious, and that they didn't have any idea whether they could help us or not, and in fact, you know, off the record said that they seriously doubted that they would be able to help us.

Senator **Biden**. Who were those people you spoke to?

Ms. **Becker**. I hate to say when it was off the record. I do not really know now. Mitchell Dale was one of them that expressed doubt as to whether or not they would be able to help us.

Senator **Biden**. So at that point you dropped the matter with Justice and moved on?

Ms. **Becker**. Yes.

Senator **Biden**. Where was he located? Where did you speak to him?

Ms. **Becker**. On the phone, long-distance. I see what you are saying, yes. He is in the Civil Rights Division. As I understand it, he is in the Civil Rights Division.

Senator **Metzenbaum**. You called to ask——

Ms. **Becker**. The whole story, on that aspect of it, is we sent a telegram to the Justice Department to Mr. Reynolds as a result of the newspaper article that we read, that they might be bringing suit in another case, asking why they had not investigated at Hissom and whether or not they would. Sometime later they did call us and asked why we had sent the telegram. And we explained these problems. That brings us up to this point.

Senator **Biden**. What is sometime later? How long after you sent the telegram did you receive a response?

Ms. **Becker**. I think it was about 2 to 3 weeks later. I could look that up in my records, but I do not have that with me.

Senator **Biden**. And then after that what happened?

Ms. **Becker**. After they contacted us?

Senator **Biden**. After they contacted you, what happened from that point on?

Ms. **Becker**. We gave them the information that we had. And due to the fact that they expressed some doubt as to whether or not they could help us, and due to the fact that we were not sure that they would be willing to help to the extent that we felt needed to be, and to the fact that we had found representation elsewhere, we went ahead and pursued it.

Senator **Biden**. So you essentially said to them that is all right, we'll take care of it ourselves?

Ms. **Becker**. Yes.

Senator **Metzenbaum**. Mrs. Foster. Glad to hear from you, Mrs. Foster. Go right ahead.

STATEMENT OF MARIE FOSTER

Ms. **Foster**. I am Marie Foster from Selma, AL. I oppose Mr. Reynolds' confirmation because Selma, Dallas County, really gave this Nation the Voting Rights Act. We feel that way because of the suffering and sacrificing that we did to get the Voting Rights Act passed.

In fighting for the Voting Rights Act, we suffered a number of the atrocities and experienced intimidation and brutality in Selma. I am a witness who saw the sheriff back in the 1960's at the court house kick a 12 year old boy in the groin. And of course, I was stuck with a cattle prod one day when we marched at the courthouse.

We would March. We would stage marches asking for the right to vote. I have proof here of bloody Sunday on Edmond Pettis Bridge. [Holding up jacket with signatures of marchers.] I have my jacket here that I was awarded for walking the 50 miles. We had a 50-mile trail from Selma to Montgomery. That was in 1965. We feel that we passed the Voting Rights Act because we did not get a Voting Rights Act until we had this movement in Selma.

Even after the Voting Rights Act was passed, we have had nothing but barriers to tolerate in Selma, Dallas County, to prevent us from voting. For example, one of the main polling places we had there was called the community center. It was located in the neighborhood where the majority of blacks lived and where blacks could go without paying a cab fare. They could get rides from their neighbors because it was in the community. That polling place was moved downtown. There were many blacks that stopped going to vote because they did not have cab fare. Many of those people were crippled and so they had to ride because they could not walk. If you do not know it, in Selma, Dallas County, unemployment is very high. There are many people out of work. Getting to the polls was a large inconvenience. There are other problems. People disliked going to the courthouse to vote because of the stigma—because of the way people were treated at the courthouse.

Senator **Metzenbaum**. What do you mean by that?

Ms. **Foster**. What do I mean? Well, blacks were not allowed to go in the front door. We were supposed to come to the side door when we would come to the courthouse, to try to register to vote. If it rained, we were not allowed to come inside the courthouse. We had to stand out in the rain.

When blacks were deputized to register people, people were glad because they could register without going to the courthouse. Going to the courthouse to get registered reminded them of the stigma.

Senator **Biden**. When you said they had a stigma, the courthouse had a stigma, they did not like going there because it reminded those of all the bad things that used to happen?

Ms. **Foster**. That's right, because of the way they were treated in the 1960's. The deputy registrars were restricted. It was one restriction after another. We were supposed to notify the public whenever we were going to register people. I was deputized 2 or 3 years after I and others applied to become deputy registrars. They finally deputized some of us.

Senator **Biden**. Why do you think they moved the polling place? Why do you think?

Ms. **Foster**. I think they moved the polling place for racially motivated reasons. Ninety percent of the people that went to the old polling place—at this particular place that was centrally located in the community—were black people. Still they moved it.

Senator **Biden**. Is the courthouse within the district? Is the courthouse within the election district or is it outside the district?

Ms. **Foster**. It's in the election district.

Senator **Biden**. And how far is the courthouse where the polling place was moved to, from where the polling place used to be? How far away did they move it to get it to the courthouse?

Ms. **Foster**. It was about a mile.

Senator **Metzenbaum**. Continue, Mrs. Foster.

Ms. **Foster**. They fired all the deputy registrars. They fired me because I was registering too many black people. I was registering too many people. About 3 weeks later they reinstated all of the people that they fired except for myself and another person.

I have reapplied. I have sent three applications in. Each time I am denied. They will not reinstate me. Still there are unregistered voters.

Senator **Metzenbaum**. Do they say why? Did they tell you why they won't reinstate you?

Ms. **Foster**. No, they do not. They just say the board acted unfavorably.

Senator **Metzenbaum**. Let me ask you this question. How did the people of Selma, the black community, feel when Mr. Reynolds approved the moving of the polling place from the black community to the courthouse? Was there a feeling that was the right thing to do, moving it to the courthouse? Was there a feeling of resentment, discrimination? What was the feeling?

Ms. **Foster**. They were very displeased. Many of them stopped going to vote. They did not go to the polls because they really were not able to pay the cab fare which at a minimum is $3. For some it costs as much as $5.

Senator **Metzenbaum**. And after the polling place was moved, voting fell off from 54 percent to about 36 percent; is that correct?

Ms. **Foster**. Well, it did fall off. I do not know the percentage. But it was very large.

Senator **Metzenbaum**. Let me ask a few questions if I may. Mr. Biden, is that all right?

Senator **Biden**. Sure.

Senator **Metzenbaum**. Ms. Guinier, how do you pronounce it?

Ms. **Guinier**. Lani Guinier.

Senator **Metzenbaum**. You have been active in the voting rights litigation, you were at the Justice Department, you are very familiar with voting rights cases. You know Mr. Reynolds' testimony in this area. Do you agree that he has provided strong advocacy in the voting rights area, or are you in disagreement with his position? And if you can make your answer rather brief.

Ms. **Guinier**. My brief answer is that I disagree strongly, as strongly as I possibly could, with his statement that he is vigorously enforcing the Voting Rights Act.

If there is any enforcement activity going on, it is because of the dedicated career lawyers, the professional lawyers whose recommendations he has admitted to overruling 30 times in the past 4 years. That is a very significant number. As Mr. Parker testified, Mr. Reynolds has only interposed 166 objections in his entire tenure. So there are 30 instances where his staff recommended an objection that he overruled it.

The significance of that is not only in the numbers. When he overrules his staff, he does not independently investigate the facts and solicit additional facts that his staff does not have. If he investigates at all, it is to talk to the alleged discriminator. He does not independently investigate to talk to the people who are the victims of the discrimination.

Senator **Metzenbaum**. I heard Mr. Reynolds testify yesterday, and I am having difficulty in comprehending what makes him tick. He is obviously an intelligent man.

And I almost tried to put together my own little poll. And we have these polls that all politicians use. And I tried to put one together. And I wonder if you would rate Mr. Reynolds in your own mind, A, he is against discrimination of all kinds; B, he is reasonable; C, he is objective and impartial in racial cases; D, he is somewhat prejudicial against black rights; and E, he is a bigot. Where would you rate him because I am having trouble?

Ms. **Guinier**. F.

Senator **Metzenbaum**. Thank you.

Mr. Quigley, you are from New Orleans. You were involved with Mr. Reynolds—I guess you were not really involved.

Mr. **Quigley**. We tried to get involved with Mr. Reynolds and he would not talk to us.

Senator **Metzenbaum**. Where would you rate Mr. Reynolds, or how do you explain him?

Mr. **Quigley**. Senator, I have to look at the effect. He is polished, he is well bred, he is articulate and that. But honestly, the net effect is the same as if he was a racist.

I hear a lot of people here that know him and like him as a person, say they do not want to say that he is a racist. I am unwilling to say that he is not a racist because in my mind racism or prejudice or an inclination is connected with the power to do something about it. And our experience in Louisiana is that he used that power against the several hundred thousand minority voters in the greater New Orleans area, and he effectively kept the door shut.

The door had been shut for over 100 years. He kept it shut for two more until three Federal judges at a cost of several hundred thousand dollars opened it. But he was holding the door shut.

For him to say—he may not use the word nigger, he may not say terrible things about people in public, but he has the same effect as Leander Perez was having in Louisiana for year after year after year. In my mind that is racism.

Senator **Metzenbaum**. Mr. Parker, do you have an opinion?

Mr. **Parker**. Senator, I grew up in Steubenville, went to Mississippi. I lived in Mississippi from 1968 to—rather from 1968 to 1981. The briefs I have seen, the positions I have seen taken by the Justice Department are virtually identical to the positions taken by the Mississippi attorney general's office during the 1960's and 1970's when we were fighting all the voting rights battles down there.

Senator **Metzenbaum**. How do you explain a man like Reynolds?

Mr. **Parker**. He's difficult to explain. I think he has a very, very restricted view, a very, very restricted view of what constitutes equal rights for minorities in this country.

He thinks if a minority district is 51 percent black in voting age population, he thinks that is enough, even though in terms of registered voters, blacks would be a minority, less than 50 percent of that district. If it is 51 percent, he thinks that is enough.

Senator **Metzenbaum**. This is going to go over my time, but I'd ask Mr. Dinerstein if you have any explanation for the conduct of Bradford Reynolds or how you rate him on my chart or your chart?

Mr. **Dinerstein**. I do not. Perhaps unlike some of the other discrimination areas, like race discrimination, Mr. Reynolds' public statements or public positions have been less remarked upon, less inflammatory, in the area of disability discrimination.

However, I think through the inactivity he has presided over, and through the restrictive interpretation of cases, statutes, and constitutional provisions, again the effect of his leadership has been to restrict the rights of disabled people rather than to extend and to effectuate them.

Senator **Metzenbaum**. Thank you very much. Senator Heflin.

Senator **Heflin**. Mr. England, I am delighted to see you here. Are you familiar with the *Selma* case? I had some information of the fact that you and Mr. Sanders were involved in that.

Mr. **England**. Senator Heflin, there are many Selma cases.

Senator **Heflin**. I mean this one about the voting poll changing from the community building to the courthouse?

Mr. **England**. I am not familiar with that particular case, sir.

Senator **Heflin**. I will ask Mrs. Foster about that case later on. Let me ask you about the Greene County matter. Basically, as I understand it, prior to the reapportionment of the local legislature members of the Greene County Racing Commission were named. When the reapportionment occurred, two black legislators were elected. The legislature subsequently passed a bill giving the Governor the power to appoint the members of the Greene County Racing Commission. Is that correct?

Mr. **England**. That's correct. Not only that, but prior to appointment by the Governor they had served 5-year terms. The new appointment was for an 8-year term.

Senator **Heflin**. That was then submitted to the Justice Department. And the Justice Department took a position. Did they take the position that this was not within section 5, or did they take the position that this did not have any effect under section 5? Was it an interpretation or a fact that they say they lacked jurisdiction?

Mr. **England**. Well, actually it is not quite clear. But I think you can say both. They found that it was not subject to section 5 preclearance. However, the *Hardy* court disagreed with them completely.

Senator **Heflin**. Originally there was an objection interposed by the Civil Rights Division of the Department of Justice, then the objection was withdrawn. And then after time was the case of *Harry County* v. *United States*, was that outstanding?

Mr. **England**. It was.

Senator **Heflin**. And then he went to court in the U.S. District Court for Alabama, northern district, in the case of *Hardy* v. *Wallace*. And the court enjoined the implementation of this change. Is that correct?

Mr. **England**. Not only did the court enjoin it, the count authorized those black legislators to appoint a racing commission. And that was in fact done.

Senator **Heflin**. Now, how many members were there of the racing commission?

Mr. **England**. There were three.

Senator **Heflin**. How many were black?

Mr. **England**. Prior to the appointment by these recently elected legislators, there were two whites and one black.

Senator **Heflin**. Two whites and one black?

Mr. **England**. That is correct.

Senator **Heflin**. After this attempted change, what is the makeup now?

Mr. **England**. The makeup based upon the appointments made by the all black legislative delegation is two blacks and one white.

Senator **Heflin**. What is the population of Greene County?

Mr. **England**. Seventy-eight percent black.

Senator **Heflin**. I suppose this racing commission operates dog racing down there?

Mr. **England**. That's correct.

Senator **Heflin**. I have seen some figures that 63 percent of the county's total revenue came from that dog track. Is that approximately right?

Mr. **England**. That's right. Racetrack revenue provided about $1.3 million of an approximately $2.2 million budget.

Senator **Heflin**. All right.

Ms. Foster, there has been in some memorandum—I believe the memorandum that was in the Department of Justice dealing with the *Selma* case where they moved the election polling place, from the community building to the courthouse. This memorandum said that the polling place was outside of the precinct.

I believe Senator Biden asked you whether or not it was in the district. This was in a city election of which, as I understand it, there were five members of the city council being elected. Do you know how many precincts were in this particular district?

Ms. **Foster**. No; I do not know.

Senator **Heflin**. You do not know about that?

Ms. **Foster**. How many precincts were in this particular district? But before they reduced the council, they moved the voting place. The voting place was moved before they reduced the number of the council.

Senator **Heflin**. When was the voting place moved?

Ms. **Foster**. I think it was moved in 1980.

Senator **Heflin**. In regards to the city election that came up last year?

Ms. **Foster**. They said the polling place was too small. But it is the most spacious place for voting in Selma. It is a large place. We went to the probater judge to ask him why it was moved. The community center——

Senator **Heflin**. The polling place was not moved in response to the city election that took place in 1984, but had been moved 4 years earlier?

Ms. **Foster**. That's right. It had been moved before that election.

Senator **Heflin**. Do you know whether the preclearance took place on this? Do you remember when the Justice Department cleared it, gave preclearance?

Ms. **Foster**. Well, I thought when the polling place was moved the Department of Justice had to give its approval.

Senator **Heflin**. Well now, would you tell us the problems that voters experience by moving the voting place.

Ms. **Foster**. The movement of the polling place diluted the voting strength of blacks. It was very inconvenient for blacks to get to the polling place when it was moved downtown because so many of them had to pay more to go to vote.

Senator **Heflin**. In other words, you have a greater distance to walk, taxi cabs, and those things?

Ms. **Foster**. That is right.

Senator **Heflin**. Now, you mentioned this atmosphere about the courthouse. In the last 20 years have blacks not frequently visited the courthouse on numerous occasions since the Selma bridge march?

Ms. **Foster**. Yes, they have visited the courthouse.

Senator **Heflin**. Is that where the food stamp office is located?

Ms. **Foster**. No; The food stamp office is at the community center, the place where the voting place used to be.

Senator **Heflin**. They moved it from the community building.

Ms. **Foster**. But the intimidation that has been going on, intimidation that they have used against black people, occurs at the polls.

Senator **Heflin**. In remembrance of the courthouse incidents you have seen, that has been a deterrence for people to go there?

Ms. **Foster**. That is right. To increase black voter participation, we needed deputy registrars.

Senator **Heflin**. They do go there to get drivers licenses, and pay their taxes, and for other purposes?

Ms. **Foster**. That is the point we brought out. They were welcome for those things. Back in the sixties we had to use the side door. Of course, they can use the front door now.

Senator **Heflin**. The community building, was it in the center of the precinct?

Ms. **Foster**. It was. It was conveniently located for blacks.

Senator **Heflin**. And how far generally would a person, if he were walking, have to go to the community center? If he lived in that precinct, how far would someone have to walk?

Ms. **Foster**. Well, just a few blocks.

Senator **Heflin**. Now, you have to walk at least a mile?

Ms. **Foster**. That is right.

Senator **Heflin**. All right.

Senator **Specter** [presiding]. Senator Biden.

Senator **Biden**. I have only a couple of questions. And I apologize for not being here earlier. The Foreign Relations Committee had a hearing and the Contra aid issue was being discussed. And I have an amendment here. And I am going to have to leave again.

Mr. Quigley, that is a pretty strong answer to Senator Metzenbaum, suggesting what I think you said, that Mr. Reynolds you thought was a racist. Is that correct?

Mr. **Quigley**. I said he has the same effect, yes.

Senator **Biden**. Let me ask you a question: Is someone who is opposed to quotas a racist?

Mr. **Quigley**. I answered based on my experience with the *Major* v. *Treen* case his refusal to meet with the black people who are objecting, the repeated opportunity he gave to the white people who were trying to protect their own political turf.

I am a lawyer, I have done hundreds of cases in court. Section 5 says the State of Louisiana has the burden of showing there is not a discrimination. The fact of the matter, by being involved in this thing personally, we had the burden of proof. We had to prove that there was racial discrimination by the Governor's office.

We were able to prove that on paper. We asked again and again for an opportunity to be able to meet, to be able to say it face to face. Because it was obvious to us that the game was going on at a level that we could not participate in.

Senator **Biden**. Mr. Reynolds said he met with black legislators. He said he met with groups, I believe was his phrase, who represented the position for the new plan. He said he did that.

Mr. **Quigley**. If he did it, he did it without the knowledge of myself or the people who were raising the plan.

Senator **Biden**. You were the lawyer for what group?

Mr. **Quigley**. I was the lawyer for the Legislative Black Caucus, for the Survival Coalition, for a number of the Southern Christian Leadership Conferences, all the people who objected to the——

Senator **Biden**. Did he meet with members of the Black Caucus?

Mr. **Quigley**. He never met with leaders of the Black Caucus at all.

Senator **Biden**. Assuming the Nunez plan had never been passed by the legislature, and the plan that was passed by the legislature had been, plan B, the second plan they passed, the basement plan, assume they had passed that plan in the legislature the first time out. Nunez was tabled, defeated, on the floor, then it came back with plan 2 on the floor.

Would that have been a—would Mr. Reynolds under that circumstance still have been required, in your legal opinion, to find that plan B was in fact inappropriate?

Mr. **Quigley**. I think it would have been at that time the kind of issue that he is trying to make it now, which is, you know, one that is a question of judgment. As an advocate I must still take the position that Nunez was not passed to create a black majority district.

It was a plan by white legislators from a suburban district who wanted the plan for themselves. And as a byproduct of it, it created a black district. They knew that was the problem with it, but they went ahead and tried to get it passed and said, for our sake we have to go ahead and create this.

That was the essence of the position to the entire plan. That is the reason why black people were the only people that did not have a role to play in the meeting below the basement in actually putting together this duckling plan precinct by precinct. And I would submit it is the same reason black people did not have an opportunity to meet with William Bradford Reynolds to articulate to his face the strength of which they felt this and the facts he had.

Senator **Biden**. I have trouble understanding how plan B could be constitutional if it had been offered first but it becomes unconstitutional because it was offered second. Can you explain that to me?

I'd like you to answer the question. I have questions for you all.

Mr. **Quigley**. The analysis under the intent standards has a number of prongs, one of which is the administrative record of how this plan came into being. The way that act 20, the duck plan, came into being was one of the indicia of intent.

The second thing, one of the other prongs of the intent test is how does it deviate from normal standards? The normal process, the normal standards, the principles of reapportionment articulated by the legislation culminated in Nunez. That was the way the process was going. The fact that it was scrapped under the threat of a veto by the Governor, which has never been overridden in Louisiana history, is an indication that this is an aberration from the usual way things are going.

Senator **Biden**. In fact, if you hold that point of view, then whatever plan the legislature comes up with—what happens if Nunez had put forward his plan, it had been debated for 20 days in the legislature, and was defeated by one vote, and plan B was then put into effect? Would you still have come into court and argued that——

Mr. **Quigley**. Absolutely.

Senator **Biden**. Well then, if that is the case, what relevance does it have whether—it seems to me what you are doing is you are giving such power to the legislative branch of the Government, that, in fact, you are treating a plan passed by the legislature as if it had become law. And that seems to me to give power to the legislature that, in fact, is superior to that of its coequal branch of Government, the executive branch.

In other words, look, we would not be sitting here unless I miss under the law, we would not be discussing this if the first and only plan ever discussed was plan B. Because plan B raised black representation in each district by anywhere from 2 to 10 to 12 percent. It was like 32—help me out.

Mr. **Quigley**. It was 2 to 1 percent in one district taken out of the other districts.

Senator **Biden**. Black representation did not go down in either district; did it?

Mr. **Quigley**. Yes; it was taken out of one and put into another, taken out of Livingston's district and put into Boggs's district.

Senator **Biden**. What was the percentage of black representation in Livingston's district prior to reapportionment?

Mr. **Quigley**. I believe it was about 20 percent.

Senator **Biden**. What was the black registration in Livingston's district after the plan was adopted?

Mr. **Quigley**. About 17 percent, 18 percent.

Senator **Biden**. You are sure of that, you are sure it went down?

Mr. **Quigley**. I am absolutely sure it went down. It was one of the objections of Congressman Livingston. He liked the few black voters he had. And he felt that was objectionable somehow that he was not able to keep those people in his district.

Senator **Biden**. So you are saying that plan B, no matter under what circumstances it had been arrived at, was still an unacceptable plan?

Mr. **Quigley**. Yes, it is unacceptable. The circumstances strengthen the hand of the Justice Department analysis and strengthen the hands of the advocates before the three judge court because of the way it happened. But, yes.

Senator **Biden**. Doesn't the circumstance that the legislation in the first instance passed the Nunez plan and then changed its argument, that obviously they were not racially motivated? If they are racially motivated why would they pass it in the first place?

Mr. **Quigley**. They passed it because it was not a big issue to them. It was a coalition of suburban white legislators with some civil rights legislators and some other people. The middle of the State was carved up in a way that was acceptable to them. It was a cross-State understanding where everybody got a little something.

Senator **Biden**. Doesn't that underscore his argument that it was politically motivated not racially motivated.

Mr. **Quigley**. That was the one that created the black district. The objection about whether it was political or racial was not brought out by anybody except the Governor. The Governor did not say I am going to veto this because of political reasons. He said this is unacceptable to me because the creation of a black majority district violates fundamental fairness.

He says that it smacks of racism to create a black majority district. He said it was ominous. And under that threat of the veto, the veto raised the ante. That tells you how many of the people have to pass the bill to make it come into effect.

With that threat the legislature had to go back and solve all the political necessities that were there in the beginning, but there was one piece that was left out. All of the political necessities were there in Nunez's plan, was served in Act 20. Jefferson parish got the majority of a district which is what they wanted. The middle of Louisiana was severed in the way they wanted. Livingston was served in the way he wanted.

The only piece that had to be left out so all of them could fit under the Govenor's perimeter, the only piece that was left out was the piece that belonged to the minority voters of Louisiana.

Senator **Biden**. Can it not be argued the reason the Governor wanted that piece left out was because he wanted to save Livingston's rear end, political, not based on race? Was that not what he was doing?

Mr. **Quigley**. The Governor submitted two written documents to the Justice Department, 40 typed pages. Not once in either one of those submissions did he ever mention the name of Livingston.

Senator **Biden**. Of course. Every time a reapportionment plan is drawn up, we all sit around and say how do we protect our district. We never say the reason we are going to do that is protect Livingston.

Just like the folks in New Orleans, or what, the suburban areas. They did not say the reason we are creating a black district is because I want to have my district stronger.

Mr. **Quigley**. Yes, they did. They said it publicly, they said it to the Justice Department and to the three judge court.

Senator **Biden**. Under inquiry they did. Are you telling me that they made the argument that the reason why they are carving up the district to look like it did, or even under the Nunez plan, is because they are going to go out there and do it for their own political gain?

Mr. **Quigley**. Absolutely, they did.

Senator **Biden**. Man, Louisiana is a very different place than any other—well, that is true I guess—than any other place.

Most of us spend all our time—we do not have that problem in Delaware, we only have one district. So I can claim purity not because of intent, because there is no chance to be impure. But the fact of the matter is most people here would say that the reason I am voting for this plan the way it is, is because it benefits the citizens of the State in the following way. The fact that it helps me has nothing to do with anything.

And is it not kind of ironic all the moaning about wanting a majority black district and they elected a white woman?

Mr. **Quigley**. I do not think that is ironic at all.

Senator **Biden**. How did that dilute the black voting power? I thought the rational was that the reason you want the majority black district was to increase the prospects of a black representative being elected to the U.S. Congress. Was that not what the power issue was all about?

Mr. **Quigley**. The power issue is that people get a chance to choose who they want to choose and that people in an inner city, poor area that is predominantly black do not have to choose—because they are a minority—they do not have to be saddled for years and years and years with the choice of a suburban white, middle-income choice.

The fact that the city of New Orleans chose Mrs. Boggs tells what the people in New Orleans think about Mrs. Boggs. Under the old plan, under the plan that Mr. Reynolds approved, she might have gotten elected or someone else might have gotten elected that would not reflect the choices of those voters.

To say that a white person cannot represent a black person or a black person cannot represent a white person is not the point. The point is that they have the opportunity to choose. Mr. Reynolds held that door closed to them for 2 more years until a court got around to doing that. That is the point of why we are here, not the end result. We talked before about process.

Senator **Biden**. My time is long up. It seems to me that Mr. Reynolds is an insensative guy. He does not put the rights of minorities on the front burner. But I think you could—I think were I his lawyer, I think I could argue the case that he in fact could reasonably, a reasonable man, particularly with his lack of sensitivity would arrive at a conclusion that in fact the action of the Governor and the legislature had nothing to do with, was not in any way based upon race, based on pure political consideration. But anyway my time is up.

Senator **Specter**. Senator Metzenbaum.

Senator **Metzenbaum**. I am intrigued by the comments of my colleague from Delaware. I come from Cleveland, that is my town. And I would like to just share with him my view that political considerations and racial rights are so intertwined that I do not know how you separate them.

Certainly when there is a black area, we as the Democrats know that that is a pretty good area to be running in. And it so happens you and I do not run in a district. We run in a State.

But to say that carving out this area was political and not racial, I think is twiddle dee, twiddle dum, because in this instance it just seems to me that you cannot separate the two. Sure, it is political. But in being political, it was to make it impossible for a black to get elected.

And I want to move over on the same case to this backdating of the memo by Mr. Reynolds. Mr. Reynolds has publicly acknowledged that in that same New Orleans case the word "June" appears because of backdating the document that figures prominently in a voting rights case in New Orleans.

Mr. Reynolds said that there was nothing serious or sinister about the dating. He went on to say, "July" might have been typed in error. It could have been whoever was typing it hit the wrong letters and went back and corrected it.

I want to tell you, that really strains my imagination how you somehow hit July when you mean June. And I know that we have with us today one of the lawyers, Ms. Guinier, who was the lawyer for the NAACP Legal Defense Fund in that case.

And I wonder if you want to address yourself about that very subject, the backdating of the memo and what you know about, and what its impact was, and why it was important.

Ms. **Guinier**. I would be happy to address that question Senator Metzenbaum. Would it be possible for me to first address Senators Biden's question, which I think is a very important question and bears on this whole issue of the significance of the backdating?

Senator **Metzenbaum**. Be my guest.

Ms. **Guinier**. As I understand Senator Biden's question, he is asking whether the intent behind the enactment of Act 20 is apparent despite either announced or unannounced political concerns that various people who were involved in the process may have had. I would like to respond to that in a number of ways.

The first is that the court specifically said in *Major* vs. *Treen* that the protection of white incumbents, while it may be a practical consideration, is not an appropriate consideration when the by-product is to fragment in the deliberate and sinister way that Act 20 fragments the minority concentration in New Orleans.

In fact, the plan—and I would argue that the very description, the very map of the plan which makes 42 turns through 31 contiguous precincts putting 14 precincts that are majority black in one district and 13 contiguous precincts that are majority black in another district, just the shape of that district is a basis from which to infer that there was some intentional discrimination going on in addition.

The Governor said—he said this to Mr. Reynolds—he said it to the newspapers, and his own proposals indicated that he had a ceiling of blacks that he would permit in any district in the State of Louisiana.

Senator **Biden**. Say that again.

Ms. **Guinier**. The Governor had a ceiling. He was not going to allow any district to be passed by the State legislature of Louisiana that had more than 44.7-percent blacks in that district. He was opposed under all circumstances to a majority black district, to any district with more than 50-percent blacks, and indeed to any district with more than 44.7-percent blacks in that district. None of his plans had more than 44.7-percent black in the district.

What Mr. Quigley was saying about the secret meeting and the effort to accommodate all of the interests is that they were attempting to accommodate these political interests within the Governor's ceiling. But the ceiling itself was evidence of racial purposes. It was evidence that he was deliberately intending to fragment a concentration of black voters in the city of New Orleans that just by the demography of the city was over 50-percent black, it was about 55-percent black.

He was opposed to any district be it compact, be it following the geographic boundaries of the parish, be it following the natural boundaries of the Mississippi River, if that district had more than 44.7-percent blacks in that district.

Senator **Biden**. What would have happened if they just kept the line that existed in 1970 in the city and brought in from north and south of those two districts the additional persons to make up the reapportionment? In other words, they did not fool at all with the line, the 1970 line, that went through New Orleans separating the two districts?

Ms. **Guinier**. They did fool with that line.

Senator **Biden**. What would happen if they did not?

Ms. **Guinier**. It would not have passed constitutional muster with one person, one vote.

Senator **Biden**. Even if they got from other portions of the district north and south of it?

Ms. **Guinier**. That is correct. Because in order to get other portions of the district, they would have had to pull people who were not in areas that were contiguous to the existing district.

Senator **Biden**. I do not know the map well enough to argue with you about that. Go ahead.

Ms. **Guinier**. The final point I would make is that the Governor's concern about having an influence district, that blacks are better off having two districts in which they are a minority rather than having a one district which they are a majority is an argument he only applied to blacks. When he was talking about Baton Rouge, or about any other part of the State, then he was in favor of having a solid majority district.

Senator **Biden**. Solid majority of what?

Ms. **Guinier**. Whites.

Senator **Metzenbaum**. Now that you took that moment to respond, let them respond to my question about the backdating.

Ms. **Guinier**. We received a memo that is dated June 18, 1982, in response to a Freedom of Information Act request that we had mailed to Mr. Reynolds on June 24, 1982. Our Freedom of Information Act request asked for any and all memoranda surrounding the decision that he made to pre-clear Act 20.

In response to that Freedom of Information Act request we received a three-page memorandum from Mr. Reynolds. That document announced his reasons for preclearance of Act 20. In that document he gave some very misleading information and some very distorted information about the evidence that he had before him. But that is all that he furnished us.

In the past prior to Mr. Reynolds' administration, in response to such a request, the staff recommendation, the analysis that the staff had prepared of a particular reapportionment change had been provided to black or other minority voters if they asked for it. It was considered the decisional document.

Senator **Metzenbaum**. Yes, but I want to know why it was important as to whether it was dated June 18 or July 18, because is it not the fact that Congress in between those two dates had enacted legislation, and that if it was June 18, that legislative enactment would not be applicable. Am I right or wrong about that?

Ms. **Guinier**. You are correct that in between June 18 and July 18, section 2 of the Voting Rights Act was amended, and there is also a question whether section 5 was amended as well to incorporate a section 2 results test.

I do not know why Mr. Reynolds backdated the document. I can only——

Senator **Biden**. But the Senator is wrong on the second point, that it had no significance. I went up the same trail. The fact of the matter is, on June 18, when section 5 was the only operative piece of legislation he had to operate from, there was at that time a decision announced by him.

Ms. GUINIER. That is correct.

Senator BIDEN. So that it was already done; he had precleared it. Then, 10 days later, or 12 or 5, or 8, whatever it was, the Congress passed and the President signed section 2 into law. Then on July 18, or, if you do not believe him——

Senator METZENBAUM. I do believe. He says it was backdated.

Senator BIDEN. Or on June 18——

Ms. GUINIER. I have a document——

Senator BIDEN. All right. Well, anyway, on July 18, he writes a memo justifying his decision on June 18, and then backdates it to June 18. Even if that is all true, the backdating, it would not have affected the standard by which he was to judge whether or not to preclear. That is the only point.

See, I thought he was doing it to really commit a very nefarious act, which was to try to avoid applying section 2, which I found interesting in his testimony.

He said to me, that if in fact section 2 had been the law, he would not have precleared this case.

Senator METZENBAUM. You know, Senator Biden's use of my time is up, but——

Senator BIDEN. I used it very effectively, didn't I?

Senator METZENBAUM. But I did want this lady to respond on this, and to do it briefly, because right now we are operating on Senator East's time, and he is in the hospital somewhere, so let's do this as promptly as you can.

Senator BIDEN. Well, she did. She answered.

Senator METZENBAUM. Are you through?

Ms. GUINIER. I believe that the reason Mr. Reynolds backdated the document was to mislead us. He was trying to mislead black voters who were attempting to get the facts surrounding his preclearance decision. I also think, in response to another point that——

Senator METZENBAUM. Senator Biden wants to know how. He does not have any more time left.

Ms. GUINIER. But he wants to know how was he trying to mislead us?

Senator METZENBAUM. Yes.

Ms. GUINIER. Because he was providing us with a document that he created in response to our Freedom of Information Act request, to avoid giving us the real decisional document, which was the staff analysis which he overruled.

Senator METZENBAUM. OK. Mr. Chairman, you have been very gracious in allowing Senator Biden to have so much time and me to have a few minutes, and——

Senator BIDEN. I think I am going to assume the chairmanship again; let's switch, Howard.

Senator METZENBAUM. But Senator Specter is the chairman now.

Senator SPECTER. I think they are important issues. We are letting you take the time you need.

Senator BIDEN. We appreciate it. You are very gracious. I do not have any more questions.

Senator **Specter**. Well, in that event, we thank you, ladies and gentlemen on panel 4. Unless Senator Heflin has additional questions?

Senator **Heflin**. No, I do not.

Senator **Specter**. Then we will move on to panel 5 and call Mr. Robert B. Kliesmet, president of the International Union of Police Administration from Washington, DC; Mr. Alvin Sykes, American Justice Campaign, St. Louis, MO; Mr. Eli Sandoval, California State Chairman, American GI Forum from Los Angeles; Mr. David Zwiebel, chief counsel of Agudath Israel of America from New York City; and Miss Susan Liss, director of the Judicial Selection Project, Washington, DC.

All right. If you would all stand and raise your right hand. I want each of you to repeat after me: I solemnly swear that the testimony I shall give in this proceeding before the Senate committee shall be the truth, the whole truth, and nothing but the truth, so help me God.

[Witnesses responded in the affirmative.]

Senator **Specter**. All of the witnesses have said I do. Let the record show they have been duly sworn.

Mr. Kliesmet, will you begin, please.

TESTIMONY OF A PANEL INCLUDING ROBERT B. KLIESMET, PRESIDENT, INTERNATIONAL UNION OF POLICE ADMINISTRATION, WASHINGTON, DC; ALVIN SYKES, AMERICAN JUSTICE CAMPAIGN, ST. LOUIS, MO; LORENZO TREVINO (REPRESENTING ELI SANDOVAL) AMERICAN GI FORUM, LOS ANGELES, CA; DAVID ZWIEBEL, CHIEF COUNSEL, AGUDATH ISRAEL OF AMERICA, NEW YORK CITY; SUSAN M. LISS, DIRECTOR, JUDICIAL SELECTION PROJECT, WASHINGTON, DC

Mr. **Kliesmet**. Yes. My name is Robert B. Kliesmet, and I am the president of the International Union of Police Associations, AFL–CIO, the police union.

I am also the president of the Institute for Police Research. Our union repesents some 17,000 law enforcement officers and has membership locals in 29 States. We work closely with other associations in all areas of law enforcement through the 50 States.

I appear here today in support of the nomination of Assistant Attorney General William B. Reynolds to the position of Associate Attorney General.

I am doubly pleased to appear here today because despite the concern over quotas, minority preferential layoffs, and court ordered disruption of established seniority and retirement systems, no one has ever asked the opinion of the rank-and-file police officers.

We have been forced to accept court-ordered interpretations in this area of legislative enactments that lack practicality——

Senator **Specter**. Mr. Kliesmet, I am going to ask you the same thing I asked the previous witness, because you just made a comment, "nobody ever asked the opinion of the rank-and-file police officers." Have you done that in this instance? Do you know how they feel?

Mr. **Kliesmet**. Yes, we have.

Senator **Specter**. How did you do it?

Mr. **Kliesmet**. We had a meeting of some 20 police officers who came to the AFL-CIO headquarters last year on behalf of their membership, and we dealt with the issue of minority recruitment——

Senator **Specter**. No, no. I am talking about how they feel about Brad Reynolds. How do you know that you are speaking for police officers?

Mr. **Kliesmet**. We recently had a board of directors meeting of the 17 regional directors from throughout the United States, and we asked their OK to have this presented to this committee. We did not do a poll of each individual member.

Senator **Specter**. You did not check with the membership. You just said the 17 regional directors—you said, "We're inclined to testify for Brad Reynolds. Is that OK with you?"

Mr. **Kliesmet**. Yes, sir.

Senator **Specter**. Go on.

Mr. **Kliesmet**. Let me state initially that my union and police officers generally, find discrimination utterly repugnant to them. Like this Congress and all people of the United States, we have grown and moved far from the hatreds and prejudices that influenced the Nation in Selma, AL, 25 years ago.

Our rank and file, and our leadership have become trained professionals who well recognize the need in our ranks for all minorities, if we are to effectively carry out our law enforcement responsibility in a country as diverse as the United States.

Without court orders, and without legislation, our union, and good management would, and does of necessity, force us to seek out minorities to fill our ranks. We are professionals. We recognize the need to have a personnel balance that reflects our communities.

We are implementing this concept by active recruitment, training, and the encouragement of all minority groups to compete for entrance into our departments and to compete for promotions.

I am not a lawyer nor am I a sociologist. I have been a police officer in the ranks and I have supervised law enforcement officers.

I can tell you that race-or-gender conscious hiring, promotion, and layoff quotas have severely damaged the morale and effectiveness of law enforcement.

There is no "quick fix" remedy to the problem. Police officers are closer to the Constitution and its mandates than all other professions.

It is a constant presence in our everyday work day. The feeling is endemic among them that they have been singled out, that their entrance rights, their promotion rights, their retention, and retirement rights have been subrogated to the rights of others not similarly situated.

Now does this relate to the Department of Justice, and the present nominee for Associate Attorney General? All law enforcement agencies throughout the country must work with and are subject to the mandates of that Department. What we are looking for and what we need to perform our tasks efficiently, is a sympathetic understanding of our problems.

In our experience with the nominee, we have encountered a desire not only to listen to our problems but to attempt to devise a workable solution.

We cannot oppose and we do not oppose any legal opinion that orders "make whole" relief to actual victims of illegal discrimination.

We do not oppose the intervention of the Department in uncorrected situations of police misconduct. We do, however, oppose quota hiring, promotion provisions that disadvantage innocent parties, either black or white, and other counterproductive remedies. Our experience with the Department in recent years has been that they parallel our concerns in these areas.

Preferential relief in the form of quotas, goals, and timetables, or set-asides to nonvictims of actual discrimination was causing such a problem in the effective recruitment and management of police departments, that in June 1984 we convened a meeting of 20 national police union leaders——

Senator **Specter**. Mr. Kliesmet, would you wind up, please. The bell has rung.

Mr. **Kliesmet**. OK. The unanimous opinion of this group was that court ordered quotas had caused unqualified minorities to be hired, and was increasingly requiring unqualified minorities to be promoted, all to the disruption of the departments, the polarization of personnel, and all too often to the detriment of the minorities hired.

We offer all of these factors for your consideration in the nomination of Brad Reynolds. We feel he has assisted us in the solution of difficult problems, and will continue to do as Associate Attorney General, if you consent to his nomination. Thank you.

Senator **Specter**. Thank you, Mr. Kliesmet.

[The statement follows:]

TESTIMONY OF

ROBERT B. KLIESMET, PRESIDENT

INTERNATIONAL UNION OF POLICE ASSOCIATIONS, AFL-CIO

BEFORE THE SENATE JUDICIARY COMMITTEE

TUESDAY, JUNE 4, 1985

Mr. Chairman, Members of the Committee, I am Robert B. Kliesmet, President of the International Union of Police Associations, AFL-CIO. I am also President of the Institute for Police Research. Our Union represents some 17,000 law enforcement officers and has membership locals in 29 states. We work closely with other associations in all areas of law enforcement, apprehension, prosecution and research throughout the 50 states.

I appear here today in support of the nomination of Assistant Attorney General William B. Reynolds to the position of Associate Attorney General.

I am doubly pleased to appear here today because despite the concern over quotas, minority preferential lay-offs, and court ordered disruption of established seniority and retirement systems, no one has ever asked the opinion of the rank and file police officers. We have been forced to accept court-ordered interpretations in this area of legislative enactments that lack practicality, polarize our personnel, create disharmony and severely disrupt the law enforcement efficiency of our departments.

Let me state initially that my union, and police officers generally, find racial discrimination utterly repugnant to them. Like this Congress and all people of the United States, we have grown and moved far from the hatreds and prejudices that influenced the nation in Selma, Alabama some 25 years ago. Our rank and file and our leadership have become trained professionals who well recognize the need in our ranks for all minorities if we are to effectively carry out our law enforcement responsibilities in a country as diverse as the United States.

Without court orders and without legislation, our union and good police management would, and does of necessity, force us to seek out minorities to fill our ranks. We are professionals. We recognize the need to have a personnel balance that reflects our communities. We are implementing this concept by active recruitment, training, and the encouragement of all minority groups to compete for entrance into our departments and to compete for promotions.

I am not a lawyer. I am not a sociologist. I have been a police officer in the ranks and I have supervised law enforcement officers. I can tell you that race-or-gender conscious hiring, promotions, and lay-off quotas have severely damaged the morale and effectiveness of law enforcement. There is no quick fix to the problem. Police officers are closer to the constitution and its mandates than all other professions. It is a constant presence in their every working day. The feeling is endemic among them, that they have been singled out, that their entrance rights, their promotion rights, their retention, and retirement rights have been subrogated to the rights of others not similarly situated.

How does this relate to the Department of Justice and the present nominee for Associate Attorney General? All law enforcement agencies throughout the country must work with and are subject to the mandates of that Department. What we look for, and what we need to perform our tasks efficiently, is a sympathetic understanding of our problems. In our experience with the nominee, we have encountered a desire not only to listen to our problems, but to attempt to devise a workable solution. We cannot oppose and we do not oppose any legal opinion that orders make-whole-relief to actual victims of illegal discrimination. We do not oppose the intervention of the Department into uncorrected situations of police misconduct. We do, however, oppose quota hiring, promotion provisions that disadvantage innocent parties, either black or white, and other counter-productive remedies. Our experience with the Department in recent years has been that they parallel our concerns in these areas.

Preferential relief in the form of quotas, goals and timetables, or set-asides to non-victims of actual discrimination was causing such a problem in the effective recruitment and management of police departments, that in June of 1984 we convened a meeting of 20 national police union leaders, a meeting made up of whites, blacks, rank and file and supervisory women and other minorities. The unanimous opinion of this group was that court ordered quotas had caused unqualified minorities to be hired and was increasingly requiring unqualified minority members to be promoted, all to the disruption of the Departments, the polarization of personnel, and all too often, to the detriment of the minority individuals so hired. They agreed that better training, better selection procedures and general encouragement would be a far better way to fill vacancies and provide a better racial balance.

We offer all of these factors for your consideration in the nomination of Brad Reynolds. We feel he has assisted us in the solution of difficult problems, and will continue to do so, as Associate Attorney General, if you consent to his nomination.

Thank you, Mr. Chairman and Members of the Committee.

Senator SPECTER. Mr. Alvin Sykes, American Justice Campaign.

STATEMENT OF ALVIN SYKES

Mr. SYKES. Yes, sir. Good afternoon, distinguished members of the Senate Judiciary Committee. Allow me to introduce myself. I am Alvin Lee Sykes. My purpose today is to offer testimony in evidence to be considered by this body in fulfilling its responsibility as well as the United States, entire Senate, in confirming the next Associate Attorney General of the United States.

I am a 28-year-old justice-seeking American and I have fulfilled my citizen responsibility to oppose violent crime in service as the national chairman for the Justice Campaign of American, and a founder.

Senator METZENBAUM. Would you tell me who the American Justice Campaign is.

Mr. SYKES. They have it printed wrong there. It is the Justice Campaign of America.

Senator METZENBAUM. Will you tell me what it is, and who belongs to it, and how many members it has.

Mr. SYKES. Certainly. OK. Certainly. The Justice Campaign of America is a broad-based human rights citizen action group that is nationally based in Kansas City, MO.

We formed in 1981 as the Steve Harvey Justice Campaign in response to a tragic—or to an acquittal of a white defendant in a criminal case in Kansas City, the baseball beating death of a musician by the name of Steven Harvey who was beaten at a park. This individual was acquitted on State murder charges despite compelling evidence presented in State court by two eyewitnesses, and other substantial evidence, and because of the dynamics of the case, this being that Steve Harvey was very popular in the community, that he was a black individual, and that the individuals involved were white, and the jury was white, caused a great level of disbelief and shock, and raised the level of racial tension in the community to the brink of hostility.

Our organization, at the request of family members—there was not an organization at that time. There was family members, friends, a coalition of civil rights groups from Kansas City wanting to pursue and see if justice could be attained in this particular case.

We came together the next day, I myself as a monitor, contacted the U.S. Justice Department Civil Rights Division, to see if there were any areas that the Justice Department could investigate in to this case. We were initially told that—I was told that nothing could be done because neither individual, the defendant or the victim in this case, were State officials, and therefore, unless one of them were, they did not think anything could be done.

Subsequently, after that phone conversation, myself and the widow of Steve Harvey went to a public library and looked up Federal civil rights, criminal civil rights law, and found two statutes, one, 241 entitled "Conspiracy Against Rights Of Citizens," and one, 245 entitled "Federally Protected Activities."

We then contacted the Justice Department once again, after giving them this information as well, and they concurred that there was possible jurisdiction because of the event happening in a public park.

So at that time, we conveyed the information to the community. We started monitoring the Federal investigation, and we came to Washington, DC, along with Catherine Harvey, who is the mother of Steve Harvey, and subsequently were educated on how a Federal criminal civil rights investigation is conducted, so that we would be able to monitor the progression of the investigation from stage to stage.

We also engaged in activity in educating the people in the community as to the progression of the investigation, and also on how the laws apply. So to go——

Senator **Metzenbaum**. Your time is running out, and I would like you to cover two points. One, who are you and who is the American Justice Campaign?

Mr. **Sykes**. The Justice Campaign of America is simply a collection of justice-seeking Americans, people who feel that they have a responsibility to support the laws of this country, and we have engaged in such since the success of the Steve Harvey case. We have become involved in other cases, and incidents around the country.

But since my time is running out, I would like to relate to the part where Mr. William Bradford Reynolds is involved in this, and why we take the stand we do.

During the course of the investigation we were afforded good cooperation from his staff. When the case went to a Federal grand jury, Mr. Reynolds indicated his support by his presence there in Kansas City during the Federal grand jury presentation.

Subsequently, the FBI, which did a tremendous investigation, were able to ascertain the killer and the person was convicted of a

Federal criminal civil rights charge under 245 and is currently serving in a Federal penitentiary in Alabama.

So, since that time, and up to that moment, we were the Steve Harvey Justice Campaign. At the conclusion of the case, we became the Justice Campaign of America, became involved in other cases and other incidents where we were able to be of assistance, and Mr. Reynolds was involved, and that was the Vincent Sheehan case in Detroit, where Mr. Reynolds met with us and assisted with our efforts in that, and subsequently the individual was prosecuted in that case.

Senator METZENBAUM. Thank you very much, Mr. Sykes. Mr. Eli Sandoval, California State chairman, the American G.I. Forum, Los Angeles, CA.

STATEMENT OF LORENZO TREVINO

Mr. TREVINO. Mr. Chairman, I would like to correct that. I am known as Lorenzo Trevino. I am a resident of Dallas, TX. I am here representing Mr. Sandoval and the G.I. Forum. I also would like to read a short statement from the Cuban Foundation before I begin with my testimony and it reads as the following: "I want to make reference as well to testimony that has been submitted to the committee by Mr. Carlos Benitez of the Cuban-American Foundation. Mr. Benitez was unable to be here personally to speak in support of Mr. Reynolds, so he has asked that his testimony be submitted as such, in support of Mr. Reynolds."

I will proceed now with my testimony. My name, as I quoted, is Lorenzo Trevino. I reside in Dallas, and I am a concerned member of the American G.I. Forum, a national Hispanic Veterans' organization.

It is a great pleasure and an honor to be here today, and to join with those who have preceded me before this prestigious body in recommending to the committee Mr. William Bradford Reynolds to be Associate Attorney General of the United States.

Mr. Reynolds is highly qualified by training and experience for this important position. In this regard, I am keenly aware of the fact that Mr. Reynolds has expanded the Department's enforcement of civil rights laws to include all, and I do mean all Americans, and to this effort has, in my opinion, benefited Americans of Hispanic descent.

In the course of the last 4½ years, we have witnessed the Civil Rights Division, under his supervision and direction, pursue or intervene in a number of important issues of particular concern to the Hispanic community.

The challenges by the Civil Rights Division to affirmative action plans, and minority set asides that included quota systems are detrimental to the interests of Hispanics and women are well documented in the Department of Justice's list of accomplishments during Mr. Reynolds' tenure.

I especially applaud his effort to correct an unfair hiring and promotion policy within the New Orleans Police Department that was detrimental to Hispanics and women.

Additionally, it is my understanding that at least two components of the Department of Justice that Mr. Reynolds will head, the Civil Rights Division and the Executive Office For Immigration Review, are of critical concern to our interests because of the frequent contact that our community has with these components.

We are particularly aware of the Civil Rights Division's criminal prosecution of abuses directed at Mexican illegal aliens by immigration officials along the Southwestern border of the United States, and prosecution directed at individuals who have sought to hold some of these aliens in involuntary servitude.

Mr. Chairman, in terms of EEO enforcement efforts, we are also aware of studies conducted by the Equal Employment Opportunity Commission that indicate that Hispanics have not benefited from these programs in comparison to other minority groups in the Southwest, where concentrations of Hispanics is the greatest.

In my opinion, the Hispanic employment record has not been greatly improved by these special programs, particularly in the Southwest where I come from.

Further, the employment picture of Hispanics in government has barely scratched the surface. So, as far as employment quotas and Hispanics are concerned, neither the Federal, State, or local governments have paid that much attention to the EEOC enforcement process.

It is for that reason that we welcome any change along the lines which have been advocated by Mr. Reynolds. Certainly his promise to make the system fair for all is welcomed within the Hispanic community as a ray of hope that things will hopefully improve for us.

In his role as a ranking member of the Attorney General's policymaking staff, we look forward to his involvement and support for a Hispanic advisory committee to the Attorney General.

Mr. Chairman, thank you again for the opportunity to appear here today in support of this important nomination.

Senator **Metzenbaum**. Thank you very much.

Mr. David Zwiebel, chief counsel, Agudath Israel of America.

STATEMENT OF DAVID ZWIEBEL

Mr. **Zwiebel**. Thank you, Senator.

Senator **Metzenbaum**. I have cut the time down to 4 minutes, just so you will all know, because we have four more panels to go, and I do not know who is going to be presiding at that 9th panel, or 10th panel, or 11th panel, but this Senator is not going to be able to be here.

So go right ahead, Mr. Zwiebel.

Mr. **Zwiebel**. I am David Zwiebel, director of government affairs for Agudath Israel of America. Agudath Israel is a 63-year-old grassroots national orthodox Jewish organization. We have 19 divisions and chapters in 30 States throughout the country.

It is my privilege and pleasure to appear before you today to explain why I think it is important that William Bradford Reynolds be confirmed for the position of Associate Attorney General of the U.S. Department of Justice.

I will not dwell on Mr. Reynolds' academic credentials, his legal acumen, or his dedication to public service. Nor will I focus on his championing of religious rights, a subject very dear and important to my heart. Nor will I discuss Mr. Reynolds' pivotal role in pointing out, and getting people to think about some of the very serious ambiguities in the legislation introduced last year in the wake of the *Grove City* decision. These issues are trees. I would prefer confining my remarks today to what appears to be the larger forest.

The controversy that now swirls around Brad Reynolds is really a controversy over the Reagan administration's general approach toward civil rights.

That approach, in rough outline, is that the constitutional, statutory, and common law rights of all Americans should be enforced on an equal basis without regard to race, color, creed, sex, or any other irrelevant characteristic.

This has proved, ironically, to be an unpopular stance among many who claim to speak on behalf of some of the very communities that historically have been victims of invidious discrimination.

This controversy is largely philosophical, and it is tied directly to competing viewpoints regarding the proper role of civil rights enforcement in this country.

Essentially, the debate is over whether our civil rights require equal opportunity or equal results. Do they protect individual rights or create group entitlements?

Do they demand color and gender blindness, or do they insist on color and gender consciousness? These are fundamental questions.

Depending on the answers provided, the enduring struggle against discrimination will propell us either down a road leading to a society ordered along racial and sexual lines, where a person's standing in the eyes of government turns on his or her race, or gender; or alternatively, down the principled path of neutrality, where the right to be free from government-imposed discrimination inheres in all Americans.

Mr. Reynolds has been a forceful proponent of this latter view. So, too, do I share that view.

Jewish people, especially Orthodox Jewish people, whose dress, diet, and strict Sabbath and holiday observance set them conspicuously apart from the majority, and frequently make them easy targets for discrimination, are particularly sensitive to the evils of quotas.

That sensitivity is borne of many years of bitter experience in this country and abroad. Quotas against Jews historically have been an outgrowth of the malignant disease of anti-Semitism.

Educational and employment opportunities have been denied to Jews because religious stereotypes replaced merit-based selection criteria.

Of course the same types of stereotypes served to exclude racial minorities and women from equal opportunity.

The debate today over quotas, concededly, is different. Quotas are motivated not by venal concerns but by noble ones. The results, however, for the Jewish community, and ultimately, we think for all of society, are no less pernicious.

Please do not misunderstand.

I wholeheartedly applaud outreach efforts designed to encourage increased numbers of qualified racial minorities to compete on an equal basis in all segments of society.

So, too, does the Reagan administration generally, and William Bradford Reynolds specifically. That is a far cry, however, from sacrificing equal opportunity at the altar of equal results.

Rejecting Mr. Reynolds would constitute precisely such a sacrifice. The Senate should confirm his nomination. Thank you.

Senator **Metzenbaum**. Thank you, Mr. Zwiebel. Susan Liss is our next witness but I am going to do something to accommodate members of the committee. Senator Heflin, Mr. Gordon Graham is here. He is the personnel director of Birmingham, and he has to catch a plane, and in order to accommodate Senator Heflin, I wonder if Mr. Graham would come forward, and if we could squeeze another chair in there. All right. Why don't you proceed, Mr. Graham.

TESTIMONY OF W. GORDON GRAHAM, PERSONNEL DIRECTOR, BIRMINGHAM, AL

Mr. **Graham**. Thank you, sir. My name is Gordon Graham. I am personnel director for the city of Birmingham. I am also representing Mayor Richard Arrington who is out of the country and could not be here today. We oppose the nomination of William Bradford——

Senator **Metzenbaum**. I think I am supposed to swear you in. Would you be good enough to rise and say you solemnly swear that the statement you are about to make is true, the whole truth and nothing but the truth?

Mr. **Graham**. I do. I have also submitted a written statement which I ask the committee to receive for the record.

We oppose the nomination of William Bradford Reynolds as Associate Attorney General. The city of Birmingham feels it has been betrayed by Mr. Reynolds, both for his failure to defend our consent decree and for his continued attack on it.

The consent decree was entered August 21, 1981. Its purpose was to remedy longstanding and pervasive race and sex employment discrimination in Birmingham.

I will not go into that. I will point out that the first part of my written statement discusses that discrimination. The Department of Justice in 1975 sued the city of Birmingham for race and sex discrimination. After several trials, the parties to the suit entered serious negotiations to attempt to settle all pending issues.

The Justice Department instigated those negotiations, played a heavy hand in them, and their attorneys drafted most of the major provisions of our consent decree.

After a fairness hearing, the court found the consent decree to be fair, adequate, reasonable, and lawful. The court record will clearly show that the Justice Department unconditionally joined the court in that conclusion.

When the decree was entered it became legally binding on all parties, having the force and effect of law.

This committee should know that when the decree was entered, the Chief of the Civil Rights Division was none other than William Bradford Reynolds.

The Justice Department made a solemn commitment to defend the consent decree against attacks on the remedial portions of the decree, a decree which its lawyers largely wrote, negotiated, strongly supported, and that was replete with race and sex conscious affirmative relief.

That commitment can be found on page 9 in the my written statement. I will not read it.

In spite of that solemn and substantial commitment, however, Mr. Reynolds and his staff in 1984 and 1985, filed motions with the court to realign tbe Government from a position of defending the decree, to a position of plaintiff attacking his own decree, a rather incredible and bizarre change in positions.

Since February 1984, attorneys from the Justice Department have been coming to Birmingham. This was well before the *Stotts* decision. They have been pouring over personnel files of the city, taking or participating in numerous time-consuming and costly depositions, appearing in court, all to contend that the city, in doing what it is obligated and required to do under the decree, is now practicing reverse discrimination.

Senator **Metzenbaum**. Are you about done, Mr. Graham?

Mr. **Graham**. Two more minutes.

Senator **Metzenbaum**. No, one.

Mr. **Graham**. One. Of more than passing interest is that the present Justice Department attorney team assaulting the decree includes none of the lawyers who, along with the city, just 4 years ago thought that 7 years of litigation had been ended.

Birmingham is not alone in our concern over Mr. Reynolds' actions. The local judge presiding over the reverse discrimination suits found early this year that "the United States has advanced arguments that appear to be contrary to its obligations under the decree."

Senator **Metzenbaum**. How much will it cost your city if the Justice Department reopens the decree in legal fees?

Mr. **Graham**. The city at this point has incurred in excess of $200,000 defending the decree. If the attacks continue we will spend additional hundreds of thousands of dollars.

Senator **Metzenbaum**. And will it help racial relations in your community if the case is reopened?

Mr. **Graham**. The decree, for the first time in the history of employment in the city of Birmingham, has provided equal opportunity and access to jobs, and promotional opportunities for blacks and females. It has made tremendous strides in improving relations in the community.

Senator **Metzenbaum**. Is there anybody in Birmingham pounding at the door to reopen the case?

Mr. **Graham**. The only people in Birmingham are white plaintiffs, members of the Firefighters Association, FOP, and BACE, organizations which have long histories of discrimination.

Senator **Heflin**. Mr. Chairman, there several letters that exist concerning the Birmingham situation that should be a part of the record, and I have been requested to ask that they be made a part of the record. These include: A letter from Judge William M. Acker, Jr., to Mr. Frank Donaldson, U.S. attorney, January 10, 1984; a letter from Mr. Reynolds to Judge Acker dated February 10, 1984; a letter to Mr. Reynolds from Mr. James Alexander of the law firm of Bradley, Arant, Rose, and White of Birmingham, who represents the city, dated February 21, 1984; a letter from Mr.

Reynolds to Mr. Alexander dated March 7, 1984; a letter addressed to Mr. Reynolds from Mr. Alexander dated March 13, 1984; a letter addressed to Mr. Reynolds from Mr. Alexander dated March 4, 1985; a letter from Mr. Reynolds addressed to Mr. Alexander on March 19, 1985; and a letter from the mayor of Birmingham, Richard Arrington, to the Honorable Senator Jeremiah Denton dated June 17, 1982.

Senator **Metzenbaum**. Without objection, all of those documents will be included in the record.

[The following documents were received for the record:]

City of Birmingham, Alabama

OFFICE OF THE MAYOR

RICHARD ARRINGTON, JR.
MAYOR

June 17, 1982

Honorable Jeremiah Denton
United States Senate
Washington, D. C. 20510

Dear Senator Denton:

I am writing in response to your inquiry regarding the letter from Birmingham Firefighter, Vincent Vella. I have made a personal review of the documents relating to Mr. Vella's allegations.

Let me assure you at the outset that no "unqualified" persons were promoted because of race, as Mr. Vella alleges. There were 153 firemen taking the promotional examination for Lieutenant on this occasion. According to the Personnel Board rules a score of "70" or above is passing and qualifies one to hold the position in question. All but 14 firemen qualified for promotion.

Vella, who had a score of 84.7, expressed concern about blacks being promoted who scored less than he. He mentioned placing sixth on the test. But Vella's score on the examination placed him 27th. Vella's rank, once he was given free points for service, gave him a ranking of 6th, based on his having 13 points added to his actual test score for 13 years of service. There are at least 20 firemen who scored higher on the test than Vella which is supposedly designed to determine one's qualifications for the job. And although they are ranked lower than Vella because they had fewer years of service and hence received fewer free points, I think Vella can hardly argue that they are unqualified or even less qualified than he. If one were to make any argument at all on this point, the conclusion would be that those firemen who scored higher knew more then Vella and could be called more qualified. But as was clearly pointed out in Judge Pointer's Court where Vella and some of his fellow firemen attempted to halt the promotion of the blacks, the difference in scores among the qualified candidates in question was not any indication of one's superiority over the other, since indeed they all qualified for promotion. I believe the Judge examined and spoke clearly to that issue.

Incidentally, the highest scorers on the examination made 90.7 and 90.4, both of whom ranked considerably lower than Vella despite

The test scores (not the rank which is based on service points and score) of the five (5) blacks who were promoted were 86.3, 83.6, 82.2, 79 and 77.3. How Vella concludes that the men, one of whom scored higher than he, are "unqualified" is puzzling. Obviously none of them received the 13 free service points Vella received since the courts have clearly established that Birmingham discriminated against blacks in hiring and blacks were not being hired by the city as firemen 13 years ago. In fact a firefighter may get as many as 20 points added to his actual score for years of service and a number did receive between 13 and 20 such points. Since the city did not even hire blacks as firefighters 13-20 years ago, the bias of giving up to 20 points in a competitive examination given to blacks and whites is rather obvious.

Hopefully, this information has been helpful. If I can provide further information, please let me know.

Sincerely,

Richard Arrington, Jr.

Richard Arrington, Jr.
Mayor

RA:an

CC: V. J. Vella

Enclosure

RADLEY, ARANT, ROSE & WHITE
1400 PARK PLACE TOWER
TELEPHONE 252-4500 AREA CODE 205
BIRMINGHAM, ALABAMA 35203

September 16, 1983

FEDERAL EXPRESS

The Honorable William Bradford Reynolds
Assistant Attorney General
Civil Rights Division
United States Department of Justice
Washington, D. C. 20530

Re: United States v. Jefferson County Personnel Board, et al.

Dear Mr. Reynolds:

I am writing, on behalf of the City of Birmingham, to express our dismay with respect to the recent conduct of the United States in this litigation. Specifically, we are concerned that the Department has not lived up to its obligations to support the Decree.

I am informed that the counsel for the Firefighters Union, R. P. Fitzpatrick, has been in communication with either you or members of your staff concerning the legality of the Decree, its implementation, or both. While we recognize the prerogative of the United States to communicate with opposing counsel and appreciate its role in that regard, we do believe it is incumbent upon the Government to provide to the City an adequate opportunity to respond in a meaningful sense when you receive information from opposing counsel. The recent developments in this case are egregious.

First, apparently on September 13, if our information is correct, Mr. Fitzpatrick communicated to your staff certain affidavit testimony from Battalion Chiefs of the City of Birmingham's Fire and Rescue Service. You should be aware that the City's counsel was not aware of the existence of these affidavits or served with copies until September-14. Obviously the difference in service, or report, impaired our ability to make any precise response to you.

We are especially troubled by the Department's reliance on these affidavits for several reasons. First, these affidavits were obtained from managerial officers of the Birmingham Fire and Rescue Service without our knowledge or participation and in a manner which we believe to be in contravention of State Bar Disciplinary Rules. Second, and more importantly from your perspective, the affidavits contained information which is contrary to evaluations filled out by affiants in their capacities as Battalion Chiefs about the particular candidate in question. We specifically invite your attention to the last two evaluations of Fire Captain Jackson and ask that you review their content. You will note the rating officers (and approving officers) are some of the same persons who proffered affidavits.

Moreover, the Bolin affidavit submitted by the Firefighters Union contained statements reflecting that, as a Fire Lieutenant, Jackson was transferred from Station 20 to Station 18 as some form of disciplinary measure. In fact, the Battalion Chiefs in the Western District of the City, when Jackson was promoted from Firefighter to Lieutenant, requested that he remain at Fire Station 20, in contravention of the Department's usual practice to rotate new lieutenants. Additionally, the decision to transfer Jackson was presented to the Fire Chief as an effort to move Jackson away from his former peers and assign him to a more responsible position. The Fire Chief was not made aware of any of Jackson's purported deficiences. Fairly viewed the affidavits proffered by the City bring into sharp question the credibility of the affiants. At the time the Department made the decision to not oppose the application for a temporary restraining order, this information was not available to the Department, or solicited by it.

Indeed, the City's position was reviewed by your Mr. Ritter approximately 30 minutes before the hearing on the putative-intervenor's Temporary Restraining Order application. We do not believe that that opportunity was adequate, nor do we believe that Mr. Ritter's evaluation of the affidavits to have been serious. Moreover, with deference to Mr. Ritter's acknowledged skills, the City did not have the opportunity to address the same level of Department decision-makers as did counsel for the Firefighters Union. With reference to the City's affidavits, which Mr.

Ritter and Mr. Rose characterized as "underwhelming", we note that the District Judge concluded they were sufficient to establish a doubt that putative-intervenors would be likely to prevail at a merits hearing.

The City of Birmingham had several incentives to enter into a Consent Decree with the United States. Not the least of these incentives was the hope of terminating the continued expense of ongoing litigation. That hope has not materialized and, in part, I attribute that to the United States. At the close of the TRO hearing Wednesday, and after Judge Pointer had denied the application for a temporary restraining order, Mr. Ritter, who I presume to have been acting upon your instructions, stood up and advised the Court that the United States, in effect, agreed with the counsel for the putative-intervenors. That representation has the effect, obviously, of encouraging additional litigation of the same sort and is contrary to the spirit, if not the letter, of the Decree.

We would remind the United States that this Administration entered into these commitments. The City assumed when it executed this Decree that it had in effect joined forces to resolve the litigation on a basis acceptable to all parties. We are concerned that the recent actions of the Department, apart from being unfair to the City, may reflect some change with respect to its commitment to its contractual obligations.

I am hopeful that we will have the opportunity in the reasonably near future, along perhaps with several of the other parties, to discuss some of these concerns with you. I understand such a meeting is tentatively contemplated for September 30. In the meantime, to the extent there are intervening applications for restraining orders referable to particular departments, I would earnestly solicit the Department to provide to the City a meaningful opportunity to articulate its reasons for the actions taken.

Very truly yours,

James P. Alexander

JPA/sbm
cc: James K. Baker, Esquire
Richard J. Ritter, Esquire
bcc: ✓ Stephen L. Spitz, Esquire
Susan W. Reeves, Esquire

FEDERAL COURTHOUSE
BIRMINGHAM, ALABAMA 35203

CHAMBERS OF
WILLIAM M. ACKER, JR.
JUDGE

January 10, 1984

Mr. Frank Donaldson
United States Attorney for the
Northern District of Alabama
Federal Courthouse
Birmingham, Alabama 35203

Re: Wilks, et al. v. Arrington, et al.
Civil Action No. CV 83-AR-2116-S

Zannis, et al. v. Arrington, et al.
Civil Action No. CV 83-AR-2680-S

Dear Mr. Donaldson:

I requested of all parties in the above two cases that they inform me if they have any objection to my obtaining an expression from the United States as to its position on the issues presented. Having received no objection, and, in fact, having been notified by both sides that participation by the United States would be appropriate, I respectfully request that you undertake at your earliest convenience to ascertain whether or not the United States will intervene on behalf of one side or the other in these cases, or, in the alternative, will appear amicus curiae. I feel it important that I know the position of the United States.

I shall look forward to an early expression from you or from the Department of Justice.

Very truly yours,

William M. Acker, Jr.

WMA,Jr.:rb
cc: Mr. Raymond P. Fitzpatrick, Jr.
Mr. James P. Alexander
Mr. Michael L. Hall
Mr. James K. Baker

U.S. Department of Justice
Civil Rights Division

Office of the Assistant Attorney General — *Washington, D.C. 20530*

FEB 10 1984

Honorable William M. Acker, Jr.
United States District Judge
Federal Courthouse
1800 Fifth Avenue North
Birmingham, Alabama 35203

Re: Wilks, et al., v. Arrington, et al.,
C.A. No. CV 83-AR-2116-S
Zannis, et al., v. Arrington, et al.,
C.A. No. CV 83-AR-2680-S

Dear Judge Acker:

Mr. Frank Donaldson, United States Attorney for the Northern District of Alabama, has referred to me your letter of January 10, 1984, in which you invite the United States to consider participation in the above-referenced cases, either as an intervenor or as amicus curiae. We fully agree with the Court and the parties to these cases that participation by the United States would be appropriate. Accordingly, the United States will move to intervene on behalf of the plaintiffs in the above-captioned cases. Our intervention on behalf of plaintiffs should not be misconstrued as a determination on our part that each of the individual plaintiffs is entitled to the rightful place relief they seek. Rather, we will intervene on behalf of plaintiffs because we believe that the allegations in their complaints, if true, establish a course of conduct which we believe to be unlawful.

Respectfully,

Wm. Bradford Reynolds
~~Wm. Bradford Reynolds~~
Assistant Attorney General
Civil Rights Division

cc: Mr. Raymond P. Fitzpatrick, Jr.
Mr. James P. Alexander
Mr. Michael L. Hall
Mr. James K. Baker

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RICHARD A. HEARD

February 21, 1984

FEDERAL EXPRESS

The Honorable William Bradford Reynolds
Assistant Attorney General
Civil Rights Division
United States Department of Justice
Washington, D. C. 20530

Re: Wilks, et al. v. Arrington, et al.
Civil Action No. CV-83-AR-2116-S
Zannis, et al. v. Arrington, et al.
Civil Action No. CV-83-AR-2680-S

Dear Mr. Reynolds:

I am writing for the second time to express my concern over the conduct of the Department of Justice. I was distressed to receive, belatedly, your letter to Judge Acker indicating that the United States will intervene on behalf of the plaintiffs in the subject cases.

The City of Birmingham entered into its consent decree with the United States to minimize its legal expenses and to achieve a reasonable settlement of the complex and comprehensive allegations which the Department of Justice and the private plaintiffs brought against the City and other governmental agencies. We entered into that decree in good faith and in reliance upon the inducement of the Department of Justice. I am incredulous that now the Department of Justice apparently will take a position which is ostensibly contrary to the decree whose entry Justice advocated. On the basis of your letter I cannot determine whether Justice challenges the legality of the race and gender conscious provisions in the decrees or whether it attacks implementation decisions. The first position is anomalous since Justice negotiated these decrees. As to the second, Justice has not registered any question - much less complaint - with either the City or with Judge Pointer, who has retained jurisdiction over the decrees.

As astonishing as Justice's posture appears, it is equally extraordinary as to how it apparently arrived at that position. In your letter to Judge Acker, you state: "We will intervene on behalf of the plaintiffs because we believe that the allegations in their complaints, if true, establish a course of conduct which we believe to be unlawful." As you must know, the issues raised by Wilks, et al. and Zannis, et al. were initially raised before the United States Equal Employment Opportunity Commission. That agency, in substantial reliance upon the decrees which Justice negotiated, determined that there was no reasonable cause to believe Title VII had been violated with respect to the charges filed by the named plaintiffs. Second, I would trust that if you would read the answers filed on behalf of the City of Birmingham, its Mayor, and the Jefferson County Personnel Board, you could make a statement to Judge Acker that the responses to the complaints, if true, would establish a lawful course of conduct. Finally, notwithstanding my invitation in my letter to you of September 16, 1983 to communicate with us, you have failed to raise these issues with the City. As far as I am aware, you have not made any investigation of the underlying facts but are proceeding merely on the basis of complaint allegations which are contrary to administrative findings of a sister agency of the United States. Other than the routine reports which the City has submitted pursuant to the Consent Decree, I am not aware of any factual basis which the government may have to reach a decision to intervene in these cases in plaintiffs' behalf.

The City of Birmingham entered into its consent decree in good faith. It has actively sought to resolve the problems with respect to the conduct and consideration of the decree with the lawyers for the private plaintiffs and the Department of Justice. In view of the Department's obligations to defend the decree, I am personally and professionally offended that we were not consulted in any respect as to these issues before you took a position with Judge Acker.

Finally, I note that your letter dated February 10 to Judge Acker was received by me on the 17th, having been mailed on February 16. Mr. Fitzpatrick, in telephone conversations, alluded to his receipt of that letter on February 15. I would be disposed to attribute the error to clerical oversight but I note that my colleague, Mr. Baker, did not receive his letter until Friday as well. In Alabama, it is appropriate to serve all parties with litigation-related documents contemporaneously.

We urge the Department of Justice to reconsider its ill-informed decision to intervene on plaintiff's side in Wilks and Zannis. You must surely be aware that intervention in plaintiff's behalf will be construed as a condemnation of the City's efforts to meet its obligations under the decree. If Justice takes a position contrary to its obligations as specified in the consent decree, the City will attempt to secure decree compliance. Certainly you must be aware that the City of Birmingham will make every effort to recoup its expenses and legal fees from the United States in the event it prevails.

I am troubled at having to write this letter and to communicate to you my concerns in strong terms; however, you must understand that the City views this matter gravely. Moreover, I confess to an apparently naive view that the United States should honor its commitments and conduct its affairs beyond reproach.

Very truly yours,

James P. Alexander

JPA/sbm
cc: Richard J. Ritter, Esquire
James K. Baker, Esquire
bcc: David P. Whiteside, Esquire
Susan W. Reeves, Esquire
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U.S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General

Washington, D.C. 20530

March 7, 1984

James P. Alexander, Esq.
Bradley, Arant, Rose & White
1400 Park Place Tower
Birmingham, Alabama 35203

Re: Wilks, et al. v. Arrington, et al.
Civil Action No. CV-83-AR-2116-S
Zannis, et al. v. Arrington, et al.
Civil Action No. CV-83-AR-2680-S

Dear Mr. Alexander:

I am in receipt of your February 21 letter expressing concern over my letter to Judge Acker accepting his invitation to the Justice Department to intervene in the above cases. Your professed "astonishment" seems to be based on a regrettable misunderstanding of our position.

First, let me assure you, as we advised Judge Acker in open court last week, that the Justice Department intends to defend the validity of the consent decree. As you know, that decree was entered to resolve charges of race and gender discrimination by the City in certain of its employment practices. An essential element of the settlement was the City's commitment not to engage in the future in racial or sex-based discrimination with regard to the hiring and promotion of its employees.

The above cases involve new charges against the City of employment discrimination on the basis of race or sex. If true, such behavior would, we believe, run counter to federal law -- specifically the Fourteenth Amendment to the Constitution -- and could not be justified as either mandated or authorized by the decree. We, therefore, advised Judge Acker that we would accept his intervention invitation.

I find your expressed surprise at our decision to intervene nominally on behalf of the plaintiffs somewhat curious. It is generally the case that the Civil Rights Division sides with the individual[s] alleging discrimination when it intervenes in a lawsuit, rather than with the employer accused of discriminatory conduct. Here, we were understandably circumspect, advising Judge Acker that we would withhold judgment on the allegations until we could fully investigate the claims. If, contrary to the allegation of the complaints, the City is not making preferential promotion decisions on the basis of race or sex, we will take the position that the City is faithfully implementing the decree and is otherwise complying with its legal obligations, and will so argue to the Court. If, on the other hand, the allegations of race- and sex-based discrimination appear from the evidence to be well founded, we will regard such activity as unlawful, and will so argue to the Court.

Hopefully, these comments will help to clarify our position. As the principal enforcer of federal nondiscrimination guaranties, and a consent decree that commits the City to nondiscriminatory employment practices, the Department has an obligation to ensure -- as the decree states -- that no person less qualified is selected over another more qualified because of race or sex. Our acceptance of Judge Acker's invitation to intervene will permit us to speak directly to whether the City is, or is not, faithfully carrying out its legal responsibilities in this regard. That is precisely the role assigned to us by Congress under Titles VII and IX of the Civil Rights Act of 1964 and by the court under this decree.

Sincerely,

Wm. Bradford Reynolds
Assistant Attorney General
Civil Rights Division

WM ALFRED ROSE 1900-1981

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RICHARD A. HEARD

March 13, 1984

BY FEDERAL EXPRESS

The Honorable William Bradford Reynolds
Assistant Attorney General
Civil Rights Division
U. S. Department of Justice
Washington, D. C. 20530

Re: Wilks, et al. v. Arrington, et al.
Civil Action No. CV-83-AR-2116-S
Zannis, et al. v. Arrington, et al.
Civil Action No. CV-83-AR-2680-S

Dear Mr. Reynolds:

Thank you for your letter of March 7, 1984. I gather that the Department has concluded not to reconsider its decision to intervene on plaintiffs' behalf in the subject cases.

Your letter suggests that you believe the City objects to the Department's intervention in the Wilks and Zannis cases. As we stated in Court, the City of Birmingham does not object to the intervention of the United States in the subject cases; the City does object to the Department's decision to intervene as a plaintiff, "nominal" or otherwise. It may well be that I suffer from "a regrettable misunderstanding" of the Department's position; however, my perception of the Department's position has its genesis in the negotiations between the City and the United States, representations made by attorneys for the United States, and the unequivocal language of the Consent Decree. Because I thought I understood the Department's position, I was surprised to learn that . . . "the Department has an obligation to ensure — as the decree states — that no person less qualified is selected over another more qualified because of race or sex." That statement distorts the unambiguous provisions of the Decree and is contrary to a position which this Department of Justice has taken on the record.

The Decree, of course, provides for promotion goals and timetables for both blacks and women. Judge Pointer, in approving the Decree which the Department and the other parties negotiated, stated that [objectors] . . . "assert that the settlements may accord preferential treatment to blacks and women with respect to future vacancies in the City's Police and Fire Departments - a contention that can hardly be disputed." Mem. Op. dated August 18, 1981 at p. 3. Moreover, at the fairness hearing on August 3, 1981, the Department of Justice's representative stated: "We believe to the extent that the two decrees contain affirmative hiring goals and promotion goals for blacks and women, that these goals, are lawful, that they do not unlawfully discriminate against whites". Hearing Tr. p. 40. Likewise, the parties' understanding of the Decree's application to competing, qualified black and white candidates was expressly stated. In addressing the Court's question of how the City of Birmingham would choose between qualified blacks and whites, the City responded:

> Assuming that the whites and the blacks were both qualified, but assuming . . . the whites were perceived to be better, if the blacks were perceived minimally qualified and we required additional blacks to meet our goals, then we would take them. Hearing Tr. p. 63.

The government did not object in any fashion, or indicate any disagreement with that view.

From the outset both the Court and the lawyers for all the parties understood that racial and gender conscious remedies were to be adopted. Had such remedies not been proposed there would not have been any necessity for the operative provisions of paragraph 3 of the Decree which purport to insulate the "remedial actions and practices" from independent discriminatory attack. This entire provision is surplusage if the government's 1984 position, that the Decree simply obligates the City to select the best qualified promotion candidate, is correct.

I suspect the Department's present position, as articulated in your letter, is predicated on a construction of paragraph 2. As I recall, paragraph 2 was proposed by the City of Birmingham in negotiations to protect itself from claims advanced by either the Department or private plaintiffs that a particular black or female should have been promoted. The language, by its own terms, certainly does not establish a requirement that the City pick the "most qualified" candidate. On the contrary, it expressly contemplates that qualified blacks and women may be promoted, even though there may be "more qualified" whites and males. Judge Pointer clearly reaffirmed his view that our understanding was the appropriate construction when he denied a temporary restraining order, sought by the Birmingham Firefighters Association 117 to block the promotion of Captain Jackson. (See, Transcript of Proceedings, September 14, 1983, at pp. 39-40).

On the basis of an unambigous record, I can only conclude that the Department was aware of the obligations which it undertook and now is espousing a position that is, first, contrary[1] to its original position and, second, in derogation of its contractual obligation to defend this Decree from collateral attack. I find little comfort in your assurance that "the Justice Department intends to defend the validity of the consent decree" when that defense is predicated upon a disingenuous construction of paragraph 2 which has evolved by way of hindsight to be consistent with the Department's present view of affirmative action.

Nor am I comforted by the statement in your letter that the Department always intervenes against an employer accused of discriminatory conduct. I might have a better appreciation for that position if you had not invited the City of Birmingham to enter into a consent decree and expressly undertake a commitment in the decree to defend it. The prospect of resistance from white employees was directly addressed in the negotiations. I continue to be troubled by the fact that the Department has now elected to intervene in support of the City's present adversaries for the express purpose of dismantling relief which it advocated. Most disturbing of all is the intellectually dishonest assertion that the present opposition to goals is consistent with the Department's earlier position in advocating the Consent Decree.

I am sorry that I have been unable to dissuade you from your present course of action. Ultimately, the Department's actions will result in considerable legal fees and expenses to my client. We do intend to seek to recover our legal fees and expenses from the Department of Justice in the event that we ultimately prevail.

Very truly yours,

James P. Alexander

James P. Alexander

JPA/sbm

cc: Charles J. Cooper, Esquire
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bcc: Robert K. Spotswood, Esquire
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March 4, 1985

FEDERAL EXPRESS

The Honorable William Bradford Reynolds
Assistant Attorney General
Civil Rights Division
U. S. Department of Justice
Washington, D. C. 20530

Re: Birmingham Reverse Discrimination Employment Litigation
Civil Action No. CV-84-P-0903-S

Dear Mr. Reynolds:

In light of Judge Pointer's opinion of February 18, 1985 and events at the status conference of February 27, 1985, I thought it appropriate on behalf of the City of Birmingham to address with you once again the role of the United States in the subject reverse discrimination cases.

At the status conference, Mr. Cooper advised Judge Pointer that the Department was actively considering a motion to modify the Birmingham City Decree in light of the decision of the Supreme Court in Firefighters Local Union No. 1784 v. Stotts, __ U.S. __ (1984). I presume that the rationale of such a motion would be that the race and gender based preferences established by the Decree offend Stotts. While we believe that the Department, at least in its public pronouncements, misreads Stotts' breadth, a motion to modify the Decree (predicated as Judge Pointer suggested upon an admission of prior discrimination consistent with the Department's original position) fairly raises that issue. By contrast, the role the Department has undertaken in the reverse discrimination cases is in derogation of its Consent Decree obligations. Moreover, the unarticulated premise of the government's challenge is that the City Consent Decree does not mean what it clearly says.

As I trust you know, the City has filed a counterclaim in *Wilks* asserting, *inter alia*, that the United States has failed to honor Consent Decree commitments. In your letter to me of March 7, 1984, you indicated that the Department's decision to intervene in *Wilks* and *Zannis* was for the purpose of a full investigation, and you characterized the Department's intervention as "nominally in behalf of the plaintiffs." In fact, the United States has litigated these cases aggressively on behalf of the plaintiffs. The government has not acted in the role of arbiter of Decree compliance; it has served, with its substantial resources, only as an advocate of plaintiffs' position.

One illustration of the government's unambiguous alignment with the plaintiffs is its conduct with respect to the complaint in intervention. The Department assiduously resisted filing such a complaint in either *Wilks* or *Zannis*, representing that the circumstances of each promotion claim would be investigated and that the government would "pick and choose" as between those promotional decisions which it would challenge and those which it would accept. When the complaint in intervention was finally filed in *Wilks*, you elected to pursue the claims of white employees on a "pattern and practice" basis. If the government actually sought to make meaningful decisions with regard to the relative merit of the claims of the respective plaintiffs, the results of any such examination are not reflected in the pleadings.

From the outset of its intervention in *Wilks* and *Zannis* the Department has failed to represent accurately its true role, which can only be described as fully supportive of the reverse discrimination plaintiffs. Moreover, I believe that the government has taken positions referable to the propriety of racial preferences under the Decree knowing that they were contrary to positions it espoused in the course of negotiations leading to the Consent Decree.

Judge Pointer observed in his recent opinion that the government has "advanced arguments that appear to be contrary to its obligations under the Decree and inconsistent with positions it pressed so vigorously in the early litigation." Opinion at 14. That certainly reflects the view of the City of Birmingham. As I am confident you are aware, Judge Pointer has indicated that an inquiry into the government's view of the Decree during the time it was negotiated and executed is appropriate. The positions advocated at that time are certainly contrary to those that have been advanced by the government in these cases both before and after *Stotts*. I believe that a fair-minded observer could only conclude that the conduct of the Department in this litigation has been motivated wholly by political and ideological considerations and is in derogation of its contractual obligations to defend the Decree. In the present posture of these cases, we are obligated to pursue vigorously the contentions raising that issue.

It occurs to me that the continuation of this litigation either is, or should be, embarrassing to the United States. For that reason and others, we request you to review the government's positions in these private cases and consider withdrawing from them. Independent of the issue of the lawfulness of race or gender conscious remedies is the question of the integrity of the Department in its dealings with others.

The City of Birmimngham has been singularly ineffective in its efforts to influence the Department's position in these cases. Notwithstanding our past failings, I hope that you give this matter serious consideration, and examine our request simply from the perspective of the best interests of the government.

Very truly yours,

James P. Alexander

James P. Alexander

One of the Attorneys for The City of Birmingham

JPA/sbm

cc: Mary E. Mann, Esquire
James K. Baker, Esquire

bcc: Robert D. Joffe, Esquire
Robert K. Spotswood, Esquire
Eldridge D. Lacy, Esquire
Richard H. Walston, Esquire

U.S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General *Washington, D.C. 20530*

3/21/85
JPA

MAR 19 1985

James P. Alexander, Esquire
Bradley, Arant, Rose & White
1400 Park Place Tower
Birmingham, Alabama 35203

Re: Birmingham Reverse Discrimination
Employment Litigation, Civil Action
File No. CV-84-P-0903-S

Dear Jim:

Thank you for your letter of March 4, 1985. Please be assured that the United States takes most seriously its responsiblities under the City Consent Decree and will avoid taking any action in derogation of those responsibilities.

As you are aware, our involvement in the Birmingham Reverse Discrimination Employment Litigation arose initially by virtue of our being named as a defendant in several cases and subsequently by our being invited to participate as an intervenor by the Court. Cognizant of our responsibilities under the Decree, Title VII, and Rule 11, we have undertaken a thorough investigation of the promotional processes within the departments at issue and of the merits of the individual plaintiffs' claims. Only after determining that the City has engaged in a pattern and practice of discriminating against promotional candidates by systematically disregarding their qualifications and promoting certain demonstrably less qualified individuals solely on the basis of race or sex did we file formal intervention pleadings and seek realignment in the Fire Department cases. Such discriminatory action by the City, we maintain, was neither required by the Decree nor permitted by Title VII.

Thus, to the extent the United States has served, in your words, "as an advocate of plaintiffs' position," it is only because we have determined that this position is required by Title VII and our enforcement responsibilities under the Decree.

I should further note that, to the extent the City Decree affords any degree of race-conscious preference to non-victims of discrimination or to the extent it can be so interpreted, the Supreme Court has made clear in its decision in Firefighters Local Union No. 1784 v. Stotts, 104 S.Ct. 2576 (1984), that such preference violates Title VII and is beyond the court's remedial authority under Section 706(g). In the aftermath of Stotts, the Department of Justice has undertaken a comprehensive review of all of our existing decrees and is seeking modification of all decrees which have continuing effect and which grant or contemplate preferential treatment to non-victims of discrimination. We have sought the cooperation of opposing counsel in each of these some fifty (50) cases so that a joint motion for modification could be filed under Rule 60(b).

In light of the fact that the City Decree is now being subjected to varying interpretations, one of which cannot be squared with Stotts, we would urge the City of Birmingham to consider a modification of the Decree to remove all ambiguity in that regard. Such a change to the Decree would best serve the interests of all parties to this litigation and could likely avoid further litigation over future promotional decisions.

Of course, a Rule 60(b) modification would have only prospective effect and would not resolve the pending claims of the individual plaintiffs. We believe, however, that a modification of the Decree that would ensure equal promotional opportunities for all employees, including these plaintiffs and the City's other non-minority employees, would go a long way toward resolving the plaintiffs' present grievances. While this has not been discussed with plaintiffs' counsel, it is conceivable that a settlement of these cases might then be possible.

We invite your serious consideration of joining us in a motion to modify the Decree to eliminate any conflict between it and the Stotts decision. Please contact me or Mary Mann to discuss this matter.

Sincerely,

Wm. Bradford Reynolds
Assistant Attorney General
Civil Rights Division

FILED
FEB 19 1985
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
JAMES E. VANDEGRIFT, CLERK

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
Southern Division

IN RE:

BIRMINGHAM REVERSE DISCRIMINATION EMPLOYMENT LITIGATION) No. CV 84-P-0903-S

ENTERED
FEB 19 1985

ORDER

In accordance with the accompanying Opinion, it is hereby ORDERED as follows:

1. The Motions for Partial Summary Judgment filed by the defendants are DENIED.

2. Pursuant to Fed. R. Civ. P. 42(b), issues regarding the effect and validity of Personnel Board tests are severed for subsequent trial after resolution of the other issues in this case.

3. All discovery pertaining to the effect and validity of such tests is deferred until completion of the initial trial.

4. The United States' Motion to Strike Affidavits or Portions Thereof is DENIED.

5. The United States' Motion to Realign as a Party-Plaintiff in Bennett v. Arrington, CV 82-P-0850-S is GRANTED, subject however, to the limitations discussed in the accompanying Opinion.

This the 18 day of February, 1985.

United States District Judge

A TRUE COPY
JAMES E. VANDEGRIFT, CLERK
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
BY: Susan Manning
DEPUTY CLERK

FILED

FEB 19 1985

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
JAMES E. VANDECRAFT, CLERK

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
Southern Division

IN Re:

BIRMINGHAM REVERSE DISCRIMINATION EMPLOYMENT LITIGATION) No. CV 84-P-0903-S

ENTERED slm

FEB 19 1985

OPINION

The defendants in these "reverse discrimination" cases have moved for partial summary judgment, seeking to dismiss portions of the plaintiffs' claims predicated upon the plaintiffs' higher rankings and test scores on selection procedures of the Personnel Board. The court concludes that, although the motions in their present form should be denied, an order should be entered which will likely have the same practical effect on further proceedings.

I. Background.

The present litigation stems from three cases instituted in 1974 and 1975 against the Jefferson County Personnel Board and various governmental agencies served by the Board, including the City of Birmingham. Two of these earlier suits were brought as class actions, charging racial discrimination against blacks in hiring and promotions; the third was brought by the United States, charging a pattern and practice of discrimination against both blacks and women. Among other allegations, the plaintiffs contended that the registers used to determine persons eligible for hiring or promotion were the product of discriminatory tests administered by the Board to screen and rank applicants and that the employing agencies engaged in still further discrimination when selecting individuals from these already tainted lists.

The cases were consolidated for trial in 1976 on the initial issue of the validity of tests used to screen and rank police and firefighter applicants. The court found that the tests had a severe adverse impact on blacks and were not sufficiently job related to be valid under 42 U.S.C. § 2000e-2(h). The Board was directed to include in its future certifications to the employers a sufficient number of black applicants to avoid any adverse impact caused by these tests. This decision was affirmed in all major aspects. Ensley Branch of NAACP v. Seibels, 616 F.2d 812 (5th Cir.), cert. denied sub nom. Personnel Board v. United States, 449 U.S. 1061 (1980).

A second consolidated trial was held in 1979 regarding many other examinations and screening devices of the Board that likewise appeared to have an adverse impact on blacks or women. Experts for both sides presented extensive evidence regarding the effect and validity of these tests and procedures. While awaiting the court's decision, the parties engaged in extensive settlement negotiations that ultimately culminated in proposed consent decrees to resolve the litigation.[1] The settlements with the Board and with the City of Birmingham included both provisions benefiting specific plaintiffs or class members—such as back pay and preferential hiring or promotion—and provisions benefiting the entire class—such as goals for certification and selection of minority candidates in future hiring and promotional decisions.

On August 18, 1981, after a fairness hearing to consider the objections of all interested parties, the court approved the consent decrees with the Personnel Board and the City of Birmingham. The following day, the Birmingham Firefighters Association #117 and two of its members moved to intervene, contending that the decrees would adversely affect their rights. The court denied their request as untimely. This ruling was later upheld by the Court of Appeals. United States v. Jefferson County, 720 F.2d 1511 (11th Cir. 1984).

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[1] The parties recognized that, regardless of the decision on the second trial, a protracted third trial would be needed regarding the particular practices of the various governmental employers. Although some evidence concerning these practices had already been obtained and indeed introduced in evidence, extensive additional discovery was likely. The settlement discussions were pursued with the objective of avoiding the time and expense of further discovery and trial and in recognition of the inherent risks of litigation regarding both the issues under submission and those remaining to be tried.

Several white male firefighters then filed an independent action against the Board and the City of Birmingham, attacking the consent decree as discriminatory. Although denying their application for a preliminary injunction against enforcement of the decrees,[2] the court recognized that the consent decrees might not bar all claims of "reverse discrimination" since they had not been parties to the prior suits. Several other suits were subsequently filed as individual or class actions by white males, contending that promotions made by Birmingham purportedly to comply with the consent decree discriminated against them because of their race or sex. These cases have been consolidated for pretrial purposes under the master caption of the "Birmingham Reverse Discrimination Employment Litigation."

II. Scope of Pending Motions.

The City and the intervening defendants[3] have moved for partial summary judgment as to those portions of the plaintiffs' claims that are premised on the plaintiffs' higher test scores or ranking on the Board's eligibility register. Many, although not all, of the facts that may have some bearing on this motion are not genuinely in dispute.

Paragraph 5 of the Consent Decree with Birmingham provides as follows:

> "In order to correct the effects of any underrepresentation of blacks and women in the City's workforce caused by any alleged prior discriminatory employment practices, the City agrees to adopt as a long term goal, subject to the availability of qualified applicants, the employment of blacks and women in each job classification . . . in percentages which approximate

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[2] This ruling was upheld by the Court of Appeals in United States v. Jefferson County, 720 F.2d 1511 (11th Cir. 1984).

[3] The persons who represented the class of blacks in one of the earlier actions and were parties to the consent decrees were allowed, on timely motion, to intervene as additional defendants in these "reverse discrimination" cases. Similarly, the United States, as a party to the earlier consent decrees, was allowed to intervene; in January 1985 it requested permission to realign itself with the plaintiffs, with whose interests its own position regarding "reverse discimination" was more compatible.

their respective percentages[4] in the civilian labor force of Jefferson County . . . ."

In paragraphs 6-8 of the decree the City agreed that in order to achieve these long term employment goals it would attempt, "subject to the availability of qualified [minority] applicants," to fill a specified percentage of vacancies on an annual basis with such applicants, this percentage ranging from 15% to 50% depending on the particular job or department. In short, qualified minority applicants were to be given a preference for a portion of the subsequent job vacancies until the long range employment goals were reached or the decrees expired.[5]

The plaintiffs in these cases contend that they would have been selected for post-decree promotions but for their race or sex. They assert that Birmingham's obligations under the consent decree cannot be relied upon by it in defense and that, indeed, employment decisions made in order to comply with the requirements of paragraphs 5-8 would necessarily constitute impermissible discrimination. As has been discussed with counsel earlier in these proceedings, the court is persuaded that the defendants can, however, defend these reverse discrimination claims if they establish that the challenged promotions were made because of the requirements of the consent decree.[6] See Palmer v. District Board of Trustees, 748 F.2d 595 (11th Cir. 1984).[7]

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[4] For blacks the appropriate percentage is approximately 28%; for women, approximately 39%. The consent decree provides a mechanism for adjusting these goals with court approval for jobs requiring professional degrees, licenses, or certificates.

[5] Under paragraph 55 of the city's decree, the court is authorized to dissolve the decree after six years from its entry—approximately 2-1/2 years from now. Any of the parties, including the United States (which now appears to oppose at least some aspects of the decree), may make such a motion, and the court is to consider whether the purposes of the decree "have substantially been achieved."

As a secondary contention, the plaintiffs argue that the decree cannot be used to justify a race-conscious or gender-conscious promotion if that action is not required by the decree.[8] They then note the provisions of paragraph 2 of Birmingham's consent decree:

> "Nothing herein shall be interpreted as requiring the City to hire unnecessary personnel, or to hire, transfer, or promote a person who is not qualified, or to hire, transfer or promote a less qualified person in preference to a person who is demonstrably better qualified based on the results of a job related selection procedure."

Plaintiffs contend that by virtue of this provision the decree does not require, and hence provides no protection against a claim of reverse discrimination based on, the selection of a less qualified black or woman. Plaintiffs propose to establish that they were demonstrably better qualified than the successful minority applicants and for this purpose will cite the higher scores they received on the Board's promotional tests, which they assert are job related selection procedures.

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[6] The Court of Appeals had pretermitted ruling on this issue in the intervention proceedings. See United States v. Jefferson County, 720 F.2d 1511, 1518 (11th Cir. 1983): "The consent decree would only become an issue [in an independent action asserting specific violation of their rights] if the defendant attempted to justify its conduct by saying that it was mandated by the consent decree. If this were the defense, the trial judge would have to determine whether the defendant's action was mandated by the decree and, if so, whether that fact alone would relieve the defendant of liability that would otherwise attach. This is, indeed, a difficult question. . . . We should not, however, preclude potentially wronged parties from raising such a question merely because it is perplexing. Since we assume that the forum hearing any future suit by the would-be intervenors alleging discrimination would consider their claims carefully, we hold that the district court was justified . . . in denying intervention."

* [7] The affirmative action aspects of the decrees regarding employment and promotion of blacks in the police and fire departments can be justified on the basis of the judicial findings—affirmed on appeal—that such persons had been unlawfully discriminated against in testing for entry level positions in those departments. The other affirmative action aspects of the decrees, although not based on judicial findings of discrimination, pass muster under the standards set in Valentine v. Smith, 654 F.2d 503, 510 (8th Cir.), cert. denied, 454 U.S. 1124 (1981), cited with approval in the Palmer case, 748 F.2d at 600.

[8] This position stems from language in United States v. Jefferson County, 720 F.2d 1511, 1518 (11th Cir. 1983), in which the appellate court noted that an element in a defense based upon the consent decree would be "whether the defendant's action was mandated by the decree." (Emphasis added.) The later decision of that court (by a panel with two of the judges who were on the Jefferson County case) in Palmer, supra, suggests a test more favorable to the defendants. In the present litigation the court has deferred its ruling as to the proper standard until the factual basis of the claims and defenses have been more fully developed.

The City and the intervening defendants assert that promotions of qualified minority candidates to meet the remedial goals established in the consent decree would not constitute unlawful discrimination, whether such promotions be mandated by the decree or merely permitted by it. They further contend that, even if their defense based on the decree is limited to employment decisions mandated by it, scores by applicants on the Board's tests—and in turn the position of such persons on the Board's eligibility register—would be immaterial in ascertaining whether the decree did or did not require particular promotions of minority applicants.

The pending summary judgment motions are focused on this latter contention; namely, that scores on the Board's promotional tests should not be considered in deciding whether particular applicants were demonstrably better or less qualified for purposes of paragraph 2. The ruling on these motions[9] has potentially great significance not only on the ultimate merits of the controversy, but also on the scope and length of further discovery and trial. Indeed, if test scores will be relevant in deciding the applicability of paragraph 2, one may expect a substantial controversy between the parties regarding the validity of each test as a "job related selection procedure" for purposes of that paragraph.[10]

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[9] Despite plaintiffs' arguments to the contrary, a motion under Fed. R. Civ. P. 56 is not an inappropriate vehicle for presenting this issue to the court. A defendant "against whom a claim . . . is asserted" may move under Rule 56(b) for summary judgment in its favor "as to . . . any part thereof;" and under Rule 56(d) the court may determine what "material" facts are controverted. Moreover, the motion may, to the extent appropriate, be treated as one for a protective order under Rule 26(c) against discovery that would be an "undue expense or burden" or as one under Fed. R. Evid. 104 for a pretrial motion on the admissibility of evidence.

III. Discussion.

The basic facts regarding the procedures by which applicants are certified by the Board to the employing agencies have been stated in earlier decisions and need not be repeated in detail. In order to fulfill its responsibilities under state law, the Board develops and periodically administers tests to persons interested in civil service positions who satisfy any prerequisites for appointment established by the Board. For very practical reasons, these tests only purport to measure a sample of the knowledge, skills, and abilities that may be needed for successful performance of a particular job.[11]

An applicant's raw test score—which for some jobs is a composite of weighted scores on different segments of the examination—is converted by the Board into a single numerical score. Applicants scoring below the minimum established by the Board are eliminated from further consideration. To the converted test score of any "passing" applicant, the Board adds (as required by state law) one point for each year of the applicant's classified service, up to a maximum of 20 points. These individuals are placed on the Board's "Eligible Register" in the order of their combined total of test points and seniority points. The Board does not disclose this Register to the employing agencies or to the applicants. It does, however, provide to each applicant information about his or her own score and position number on the Register; to the extent they share this information, applicants are able to construct the equivalent of the Register.

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[10] In such a controversy the position of two of the major parties might be the reverse of that in the earlier litigation. The United States, which previously had attacked the various tests as not sufficiently job related, may attempt to support their validity; on the other hand, the City may seek to challenge the validity of the tests.

[11] For example, although the position of police sergeant may require both the ability to accurately shoot a firearm and knowledge of constitutional law, the Board does not attempt to measure applicants' abilities with firearms and attempts to measure their knowledge of constitutional law by asking some representative questions.

When notice that a governmental employer wishes to make a promotion, the Board submits to the employer a "Certification of Eligibles," which contains the top three names then remaining on the Register.[12] Under the consent decrees the Board may certify the names of additional qualified minority applicants from further down on the Register "whenever such action is necessary to provide the City with a certification list that contains sufficient numbers of blacks and females to meet the goals" of the decrees.

The certification sent by the Board does not reflect the test scores or Register ranking of the persons so certified. Birmingham acknowledges however that those making employment decisions "assume" that the order of names on the certification indicates their relative standing on the register—that is, that the second name on the certification is lower on the Register than the first name and higher on the Register than the third name.[13] Plaintiffs do not contend that the relative placement on the Register of the applicants establishes in and of itself that the higher ranked applicants are demonstrably better qualified for promotion.[14] Rather, they argue that the tests are job related selection procedures and accordingly that under paragraph 2 of its decree the city would not be required to promote applicants with lower test scores. They assert that city officials either know these scores or by inference from the certification can determine the relative scores of the various candidates. Alternatively hey argue that, regardless of the knowledge the city may have about test scores when deciding whom to promote, they—the plaintiffs—should be entitled in a subsequent claim of discrimination to demonstrate their superior qualifications by reference to the test scores and thereby show that the city could have promoted them without violating the consent decree. This latter contention should be addressed first because, if plaintiffs succeed on this point, there would be no need to determine what information city officials may have had about test scores when deciding on promotions.

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[12] If multiple appointments to the same job are contemplated, the Board certifies an additional name from the top of the Register for each additional position.

[13] The United States makes a curious attack upon the inclusion of such "assumptions" in the affidavits of the city's officials, asserting that such represents matters beyond their personal knowledge and hence impermissible under Fed. R. Civ. P. 56. These objections are without merit, for these "assumptions" are not being presented as evidence of what the Board actually does in making certifications, but only as evidence of the state of mind of the officials in using the certifications.

[14] Although the validity of bona fide seniority systems is recognized under Title VII, it could hardly be contended that because of longer city service an individual would be demonstrably better qualified for promotion.

Paragraph 2 provides in relevant part as follows: "Nothing herein shall be interpreted as requiring the City . . . to promote a person who is not qualified or . . . to promote a less qualified person in preference to a person who is demonstrably better qualified based upon the results of a job related selection procedure." The obvious purpose of the paragraph was to relieve the city from responsibility under the decree if, although otherwise mandated by the decree, it should reject a minority candidate because of the results of a job related selection procedure showing that person to be unqualified or demonstrably less qualified. In evaluating any failure by the city to meet its obligations under the decree, the court would focus its attention on the information the city had when it declined to appoint the minority candidates and not on subsequently obtained information that played no part in those appointments. Such a proceeding might well include further studies regarding the job-relatedness of the selection procedures upon which the city relied in making its employment decisions; however, there would be no need to determine whether promotional criteria not considered by the city might have been valid.

Although the context is different in this litigation involving claims of reverse discrimination, the answer is the same. In short, the effort by plaintiffs to show that promotions of minority candidates were not mandated by the decree because of paragraph 2 will depend upon their establishing, at a minimum, that when making those selections the city had information demonstrating that such candidates were less qualified.

Consideration must therefore be given on these Rule 56 motions to the question of what information regarding test scores city officials may have had when deciding whom to promote from the Board's "Certification of Eligibles."

It cannot be genuinely disputed that the city officials have not been provided by the Board with test scores or ranking, seniority points, final scores or ranking, or position number on Register.[15] This is not to say, however, that city officials have absolutely no knowledge about such matters.

First, the appointing officials may be provided by or through the applicants themselves information about test scores or rankings. As earlier noted, applicants are provided information about their own scores and Register position and by sharing this information they can develop an approximation of the Register.[16] According to depositions and affidavits submitted by plaintiffs, these unofficial listings are sometimes posted at fire stations or other locations where they are viewed by supervisors who may be involved in deciding on appointments when vacancies occur. It is unclear whether these posted listings disclose merely the projected positions on the eligibility register or also the final grade based on test scores and seniority.

Second, the appointing officials can draw some inferences about test scores from the Certification of Eligibles provided by the Board. Since the officials "assume"—an assumption which, to the extent pertinent, appears consistent with the actual practice of the Board—that the eligibles are listed on the certificate in the same order in which they appear on the Eligibility Register, the total of the converted test score and seniority points of the individual who, for example, is second on the certificate may be assumed to be higher than those for individuals lower on the certificate but less than that for the individual highest on the certificate. Appointing officials may already know or be able to determine from city records how many seniority points various individuals on the certificate would have been awarded. By considering these seniority points, an appointing official could infer that a person would have had a higher converted test score than those individuals lower on the certificate with the same or a greater number of seniority points, and a lower converted test score than those higher on the certificate with the same or a lesser number of seniority points.[17] No such inference, however, could be drawn when comparing an individual with those lower on the certificate having fewer seniority points or with those higher on the certificate having more seniority points.

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[15] No dispute arises from the fact that at an earlier stage in these proceedings a city official did have this information regarding a particular position (Fire Lieutenant Examination, January 26, 1982). The official has explained by affidavit when and how this information was obtained and for what purpose it was used. In short, these items were procured by the city from the Board through discovery requests after a claim of reverse discrimination was made and were used only in the course of that proceeding.

[16] These informal compilations are not necessarily reliable. As indicated in these same depositions, information may not be obtained from all applicants and the information provided by the applicants is not always accurate.

Knowledge of relative test scores, whether inferred from the certificate of eligibles or learned from information supplied by applicants, would not however establish that a particular applicant would be "demonstrably better qualified" than another with a lower score. That a test may be valid for both screening and ranking purposes does not mean that as between two individuals the one with the higher score is better qualified than the one with the lower score. Rather, the validity of a test is assessed in the context of its ability to make job-related measurements that are reliable and valid for groups of individuals. Any attempt to assess the relative qualifications of two individuals on the basis of their test scores is a risky process, and at a minimum requires knowledge of the magnitude of the difference in their scores if not also the significance of that difference given the characteristics of the measuring device. The need for such information under paragraph 2 of the consent decree is highlighted by e language of that paragraph relieving the city from its minority employment goals only if such minority applicants are "demonstrably" less qualified.[18] (Emphasis added.)

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[17] A limited additional inference could be drawn in such circumstances as to the magnitude of the difference; namely, the difference in converted test scores would have been no less than the difference in seniority points.

The "Rule of Three"—under which employing agencies have been empowered by state law to select any of the three names submitted by the Board—implicitly recognizes this fundamental concept that the Board's tests, even if sufficiently job related when considered for a group of applicants, are not necessarily a proper measurement of relative qualifications of particular individuals. Under this rule, the city has been free to select the person on the certification with the lowest test score, and this has been true even though that person's test score may have been significantly lower than those of others certified. Moreover, given the role of seniority points, the persons certified for consideration might have converted test scores as much as twenty points below those of persons not certified for consideration and those with the highest test scores may not receive consideration until after many persons with lower scores have been selected.[19]

What this means is that the certification would not have provided city officials with sufficient information to relieve it from its obligation to meet the employment goals established by the decree. In turn, the plaintiffs in this reverse discrimination case cannot prevail on a claim that minority appointments were not required under paragraph 2 by relying on the limited knowledge about test results that could be derived from the Board's certifications.

The materials submitted by plaintiffs in opposition to the Rule 56 motion do, however, create a genuine issue as to the extent of knowledge that city officials may have had about actual test scores as a result of information provided by the employees themselves. It may be—although this appears very doubtful—that the city officials making (or recommending) promotions did on some occasions have sufficient reliable information about these test scores and about the significance of the differences in these scores to have been justified in not promoting a minority applicant. In such a circumstance, the unsuccessful white male may be able to establish, subject to providing additional proof regarding the validity of the test,[20] that the promotion of the minority applicant was not required by the decree and was in turn discriminatory. The court therefore cannot say at this time that the defendants are entitled to summary judgment against all efforts of plaintiffs to show information regarding test scores or that information regarding validity of these tests will necessarily be irrelevant.[21]

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[18] Of the common meanings of the word "demonstrably," the ones most suitable in this context are "obviously" or "clearly."

[19] As an example, the person who received the highest test score on the January 1982 fire lieutenant exam had only 4 seniority points and was ranked 19th on the eligibility register.

Although the pending motion for summary judgment is therefore due to be denied, the fact remains that the plaintiffs are not likely to prevail on this part of their reverse discrimination claims, in which event the validity of the Board's tests will not be relevant. Considering the substantial time and expense of discovery and trial that might be wasted on exploration of the validity of these tests, the court concludes (1) that under Fed. R. Civ. P. 42(b) issues regarding the validity of such tests should be severed for subsequent trial, as necessary, after resolution of the other issues in this litigation and (2) that under Fed. R. Civ. P. 26 further discovery into such issues should be deferred until after this initial trial.

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[20] The court disagrees with the defendant's contention that paragraph 2 could apply only if the city officials at the time of making their selections also had detailed information supporting the validity of the tests.

[21] Plaintiffs contend that, irrespective of its relevance on the city's defense premised on the consent decree, the validity of the tests may also be material in the plaintiffs' establishment of a prima facie case of discrimination (that test scores, if the tests were valid, would help prove they were qualified for the position filled by a minority applicant) or to show that any defense based on selection of the better qualified candidate would have been pretextual. While this may be true, it does not appear that the defendants in this litigation will be challenging the plaintiffs' qualifications or claiming that they selected the better qualified candidate.

As earlier noted, the United States has asked for permission to realign itself with the plaintiffs. The defendants oppose this request, noting that the decree (to which the United States was a party) provides as follows:

> "3. Remedial actions and practices required by the terms of, or permitted to effectuate and carry out the purposes of, this Consent Decree shall not be deemed discriminatory . . . and the parties hereto agree that they shall individually and jointly the defend the lawfulness of such remedial measures in the event of challenge by any other party to this litigation or by any other person or party who may seek to challenge such remedial measures through intervention or collateral attack.
>
> . . . .
>
> "54. Compliance with the terms and conditions of this Consent Decree shall constitute compliance by the City with all obligations arising under Title VII . . . as raised by the plaintiffs' complaints. Insofar as any of the provisions of this Consent Decree or any actions taken pursuant to such provisions may be inconsistent with any state or local civil service statute, law or regulation, the provisions of this Consent Decree shall prevail in accordance with the constitutional supremacy of federal substantive and remedial law."

To the extent the United States in good faith believes that actions of the city are discriminatory against the plaintiffs and are neither required nor permitted by the Consent Decree, it may support the plaintiffs' position in this litigation without violating the terms of the consent decree and accordingly may be allowed to align itself as a party plaintiff.

In its brief supporting the plaintiffs on these pending summary judgment motions, the United States has advanced arguments that appear to be contrary to its obligations under the Decree and inconsistent with positions it pressed so vigorously in the earlier litigation. It seems to be contending that promotion of a minority candidate with lower test scores would never be required by the Decree and would constitute a prima facie case of impermissible reverse discrimination and, indeed, that the city would have a duty to seek such information before considering appointment of a minority candidate. Such a position could hardly be consonant with its obligations to uphold the decree, which clearly contemplated that a portion of new appointments would go to minority candidates lower on the eligibility registers. Its apparent change in position is particularly questionable in view of the fact that it has contended—and documented with extensive evidence in the earlier litigation—that the tests have discriminatory impact against minority candidates and are not sufficiently job related to be valid ranking devices under 42 U.S.C. § 2000e-2(h).[22] Although permitting the United States to align itself with the plaintiffs, the court will insist that the United States act in accord with its obligations under the Decrees.

This the 18th day of February, 1985.

Sam C Pointer Jr
United States District Judge

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[22] The United States might, of course, be justified in changing its position regarding the impact and validity of these tests if it had obtained new evidence demonstrating its earlier views were incorrect. There is no indication that any such new evidence has surfaced.

A TRUE COPY
JAMES E. VANDEGRIFT, CLERK
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
BY: Susan Manning
DEPUTY CLERK

Senator **Metzenbaum**. Unless you have——

Senator **Heflin**. I think that will present both sides, as to Mr. Reynolds' position, and the attorney for the city's position, and those correspondences present the different positions in this controversy that exists.

Senator **Metzenbaum**. We appreciate the Senator's cooperation.

Mr. **Graham**. There is one additional letter of September 16, 1983 from Alexander to Reynolds, if that could also be added.

Senator **Heflin**. Well, if you have copy of it, I would be glad to put that in. I did not have a copy of that.

Senator **Metzenbaum**. Without objection, that will be included in the record.

Senator **Metzenbaum**. Thank you, Mr. Graham.

[The statement follows:]

City of Birmingham, Alabama

RICHARD ARRINGTON, JR.
MAYOR

OFFICE OF THE MAYOR

June 5, 1985

TESTIMONY OF W. GORDON GRAHAM, PERSONNEL DIRECTOR OF THE CITY OF BIRMINGHAM, ALABAMA, BEFORE THE SENATE JUDICIARY COMMITTEE ON THE NOMINATION OF WILLIAM BRADFORD REYNOLDS FOR THE POSITION OF ASSOCIATE ATTORNEY GENERAL OF THE UNITED STATES

Mr. Chairman, I thank you for the opportunity to appear before this Committee today. My name is W. Gordon Graham and I am the personnel director for the City of Birmingham, Alabama. I am the City's named affirmative action officer and in that capacity oversee and monitor our affirmative action programs. I also review and approve recommended personnel appointments from the respective city departments for the Mayor. I am representing here today Mayor Richard Arrington, Jr., who could not attend today as he is out of the country on business.

We are deeply disturbed and distressed by the policies pursued by Mr. William Bradford Reynolds in his capacity as Chief of the Civil Rights Division of the U.S. Department of Justice. His efforts to undermine our 1981 consent decree are unwarranted, blind to Supreme Court and lower federal court rulings, against public policy, and an abdication of his responsibility as a high public official to safeguard the civil rights of all citizens of the country. Moreover, whatever Mr. Reynolds' philosophical views are on Affirmative Action, the fact is that in Birmingham, Mr. Reynolds' subordinate lawyers largely wrote the Consent Decree and defended its lawfulness and fairness before the court. The Justice Department in the Decree itself committed the United States to join with the City in defending that Decree against any challengers. That certainly included the white male present plaintiffs in the Fire and Police Departments now enjoying the Justice Department's active participation at their side in the ongoing "reverse discrimination" suits attacking the Decree. We therefore vigorously oppose the pending nomination of Mr. Reynolds for the position of Associate Attorney General.

Let me briefly review with you the situation in Birmingham.

Birmingham is under a civil service system administered by the Jefferson County Personnel Board for the entire county. The system was enacted into law by the Alabama legislature in 1935. All city employment related to recruitment, testing and certification of candidates for hiring and promotion is exclusively controlled by the Personnel Board. All skilled jobs up to and including department heads are in the classified service under the jurisdiction of the Personnel Board. The unclassified service not covered by the civil service system is made up primarily of unskilled laborers.

As recently found by a federal court in Birmingham, the civil service law was passed only upon its sponsors' assurances that the adoption of the law would never result in the employment of blacks in the classified service of the county or any of its cities (of which Birmingham is by far the largest). In setting forth its findings, the court clearly showed that from 1935 to 1969, Birmingham and Jefferson County engaged in a rigid policy of segregation. Employment opportunities were denied to blacks and females. The civil service system did nothing significant to remedy the discrimination. Real changes began only with a change in federal law and court actions.

Employment statistics bear out the finding that blacks have been excluded from the vast majority of positions in the classified service. As of January 1, 1966, blacks held only 66 or 1.9% of the 3,430 merit system jobs in the entire County civil service. Birmingham had a grand total of 9 black classified employees out of a total of 1,689 classified employees in the City in January, 1966. On the other hand, the unclassified service was predominately black.

Even if appointing authorities, such as the Mayor of the City of Birmingham, were inclined to appoint blacks, the civil service system severely compromised that possibility. For the six year period from 1960 to 1966, for example, the Jefferson County Personnel Board processed 20,897 applicants for employment. Of that total 518 were black. Only 42 of the blacks, an average of seven per year, made it through the recruitment and evaluative practices of the Personnel Board.

In January, 1975, the year the Justice Department sued the City for employment discrimination, the City had only 155 black classified employees out of a total classified workforce of 2,223 persons. The unclassified service remained predominately black.

Employment discrimination was clearly evident in hiring black police officers. An early interracial committee of black and white leaders appointed in 1950 sought unsuccessfully the appointment of black police officers. When the committee disbanded in 1956, the Personnel Board still restricted police officer applicants to "white only". Federal court action was required to bar the Personnel Board from placing racial restrictions on police jobs. That occurred in 1958. Still no blacks were hired as police officers. In the aftermath of the civil rights demonstrations in 1963, when fire hoses and dogs were turned on demonstrators and four black children were murdered in a church bombing, interest again turned to hiring blacks in the police department. Still no blacks were hired. In 1965, the Citizens Supervisory Commission (the body that appoints members to the Personnel Board) retained a management consulting firm to study police employment practices in Jefferson County with particular reference to Birmingham. The firm found that the efforts of the Personnel Board staff in the recruitment of police officers was very minimal and was directed to sources of white applicants. It was not until 1966 that Birmingham hired its first black police officer. Ten years later, after the City and the Personnel Board were sued for employment discrimination by the Justice Department, only 28 or 5% of the sworn officers were black. There were two black sergeants. No black had a rank above sergeant. In August, 1981 when we entered into the Consent Decree with the Department of Justice, Birmingham, with a majority black population, had 651 police officers, of whom only 82 or 13% were black. Of the 131 sergeants on the police force, just three were black. Still no black had a rank above sergeant.

A similar situation existed in the Fire Department. The City's first black firefighter was not hired until 1968. In 1966, only 13 or 2.1% of the firefighters were black. In August, 1981, of the 453 firefighters, 42 were black. No black held a rank position in the Fire Department prior to the Consent Decree.

In January, 1974, a Birmingham branch of the NAACP (represented by private counsel) and several blacks (represented by the Lawyers' Committee for Civil Rights Under Law) brought separate Title VII employment discrimination suits against the City of Birmingham and the Jefferson County Personnel Board. As previously shown, racial discrimination in the city's public service was pervasive in Birmingham. In May, 1975, the U.S. Department of Justice filed its Title VII suit charging the City and the Personnel Board with both race and sex discrimination in employment. The federal district court in Birmingham consolidated the three cases for trial in 1976. Attorneys for the Department of Justice took the principal role in presenting the various claims against the defendants.

In January, 1977, the court found that the Personnel Board tests used to screen and rank applicants for employment as police officers and firefighters discriminated against blacks. The tests were not valid for rank order certification; the Personnel Board was ordered to certify black and white applicants based on the percentage of black and white applicants. That ruling was upheld by the Fifth Circuit on appeal by the Jefferson County Personnel Board. A second trial was held in August and October, 1979. At issue were a number of other claims directed against practices of the Personnel Board. Under attack by the Justice Department and the other plaintiffs were eighteen other tests; various rules affecting promotional requirements for certain jobs; and the restriction of some job announcements and certifications to persons of a particular sex. While the court was preparing its opinion, the parties entered serious negotiations to resolve by settlement the outstanding issues. The City Decree resulted from those negotiations. A heavy role was played by the Justice Department whose attorneys proposed and wrote most of the City Consent Decree language, including race-conscious affirmative action goals. Upon reviewing the decree and after holding a fairness hearing in August, 1981, the court approved the City decree, having found it to be fair, reasonable, adequate, and lawful. At the hearing, the Justice Department unconditionally joined in this conclusion: "We believe to the extent that the two decrees contain affirmative hiring goals and promotion goals for blacks and women, that these goals are lawful, that they do not unlawfully discriminate against whites." It is important to note that the Assistant Attorney in charge of the Civil Rights Division in August 1981 was none other than Mr. William Bradford Reynolds.

At the fairness hearing in August 1981, the Birmingham Firefighters Association attacked the promotional goals for the Fire Department. In his Memorandum of Opinion approving and entering the Decree, the judge found that the goals under attack were "well within the limits" upheld as permissible in earlier court decisions and that it "can hardly be disputed" that the remedial provisions of the Decree "may accord preferential treatment to blacks and women... ." As to a judicial finding of discrimination in higher level jobs, the court stated:

> "While the only judicial finding of discrimination thus far entered has been with respect to the effect upon black applicants of the Personnel Board's tests for police officer and firefighter, it can hardly be doubted that there is more than ample reason for the Personnel Board and the City of Birmingham to be concerned that they would be in time held liable for discrimination against blacks at higher level positions in the police and fire departments and for discrimination against women at all levels in those departments. The proposed consent decrees, by way of settlement for such potential liability, provide appropriate corrective measures reasonably commensurate with the nature and extent of the indicated discrimination."

28 Fair Empl. Prac. Cas. (BNA) at 1838.

On August 21, 1981, the court entered the Decree after noting that the remedial steps were limited in duration, expiring as particular positions generally reflected the racial and sexual composition of the labor market in the county as a whole (not the City which has a substantially higher black population), that there was substantial opportunity for employment and advancement of whites and males; and that there was no requirement to select blacks or women who were unqualified or who were demonstrably less qualified than their competitors.

Thus the history of past discrimination in Birmingham was presented in court by Justice Department lawyers at two trials and subsequent appeals from 1976 through 1982. Justice Department lawyers wrote, negotiated and strongly supported the Consent Decree in 1981; a Consent Decree replete with race and sex-conscious affirmative action relief. In 1981, the Justice Department lawyers signed a solemn commitment in the Decree to defend the lawfulness of the remedial measures in the Decree if such remedies were challenged. So what does Mr. Reynolds and his staff do in 1984 and 1985? Incredibly, he filed motions in several "reverse discrimination suits" to realign the United States from the position of defendant defending the Decree against attack to the position of plaintiff attacking his own Decree.

Since the beginning of 1984, well before the Supreme Court decision in the Stotts case, lawyers in the Civil Rights Division of the Attorney General's office have been coming to Birmingham, pouring over employment files, taking or actively participating in what seems endless and, for the city, extremely expensive discovery and depositions and appearing in court -- all to now contend that the City of Birmingham, in seeking to do that which the Consent Decree requires or authorizes the City to do, is engaging in unlawful "reverse discrimination" against white male employees.

It is of more than passing interest that the composition of the Justice Department's lawyer-team presently assaulting the Consent Decree includes none of the lawyers who, along with the City, just three years ago thought that seven years of litigation had been fully ended with a Consent Decree, precluding any possible future litigation about the requirements of the Decree, certainly any litigation brought by parties to the Consent Decree. The sole purpose of the Consent Decree was to seek to at least partially remedy a long history of systematic racial discrimination in city employment, a history factually established in the litigation and appropriately found to exist by the court. When one looks at the Consent Decree, which in August 1981 this administration successfully urged the federal court in Birmingham to approve, the government's present posture raises serious questions of propriety and ordinary decency. A Consent Decree is a voluntary agreement between the parties -- here, the City of Birmingham and the Government of the United States. Heretofore, we were secure in the belief that an Agreement with the United States, approved by a Court of the United States, was a solemn a pact as imaginable -- certainly not an agreement which either party was at liberty to breach. Sadly, we were in error in this belief.

In paragraph 3 of its Consent Decree with our City, the Government of the United States solemnly stated:

> "3. Remedial actions and practices required by the terms of, or permitted to effectuate and carry out the purposes of, this Consent Decree shall not be deemed discriminatory .... and the parties hereto agree that they shall individually and jointly defend the lawfulness of such remedial measures in the event of challenge by any other party to this litigation or by any other person or party who may seek to challenge such remedial measures through intervention or collateral attack. If any collateral lawsuit involving this Consent Decree arises in state court, then the City shall notify counsel for the plaintiffs and remove such action to the United States District Court." (emphasis supplied.)

But, hardly two years after so stating, Mr. Reynolds began marshalling an attack on the very "remedial actions" the City took in accordance with the Decree. It is important to note that these remedies were not Court-imposed; they were voluntarily agreed upon by the Justice Department and the City.

In paragraph 54 of the Decree, the Government of the United States solemnly committed itself to the following proposition:

> XX. EFFECT OF COMPLIANCE
>
> 54. Compliance with the terms and conditions of this Consent Decree shall constitute compliance by the City with all obligations arising under Title VII of the Civil Rights Act of 1964, as amended, the State and Local Fiscal Assistance Act of 1972, as amended, the Omnibus Crime Control and Safe Streets Act of 1968, as amended, the Civil Rights Act of 1866 and 1871, 42 U.S.C. § 1981 and § 1983, and the Fourteenth Amendment to the Constitution of the United States as raised by the plaintiffs' complaints. Insofar as any of the provisions of this Consent Decree or any actions taken pursuant to such provisions may be inconsistent with any state or local civil service statute, law or regulation, the provisions of this Consent Decree shall prevail in accordance with the constitutional supremacy of federal substantive and remedial law."

The Justice Department, in its ongoing "reverse discrimination" litigation in Birmingham has taken two contradictory positions. On the one hand, they assert that the Decree is valid, but that the City, in carrying out its obligations under the Decree, has unlawfully trampled upon the somehow superior rights of white employees. On the other hand, the Justice Department has recently written the City of Birmingham's counsel urging the City to join with them to have our Consent Decree modified because "interpretations of the Decree" are inconsistent with the Stotts opinion. Certainly, that letter is more than a tacit admission that Mr. Reynold's displeasure is not with the City's "remedial actions," but rather that he is determined to demolish the Decree which his own Department wrote, approved as lawful, and committed to defend against attack.

The City of Birmingham is not alone in its view that the Civil Rights Division under Mr. Reynolds' stewardship is not acting in accordance with the Decree. Indeed, the Judge who entered the Consent Decree recently found that "the United States has advanced arguments that appear to be contrary to its obligations under the Decree. ..." In re Reverse Discrimination Employment Litigation, 37 Fair Empl. Prac. Cas. (BNA) 1, 8 (N.D.Ala., Feb. 19, 1985).

The Consent Decree has been operating smoothly and there have been no significant problems with it. It was approved by the Mayor and the City Council, the duly elected officials of the city. Most knowledgeable and sensitive persons understand

and accept the Decree. For the first time in the history of the city government, barriers to employment and promotion have been effectively removed for women and minorities.

Other than the Justice Department, the only major attacks on the decree have come from members of predominantly white employee unions that have long histories of racial discrimination. The Birmingham Association of City Employees (BACE) is a union of professional, technical and clerical employees. In 1963, BACE passed a resolution which stated, in part, "NOW THEREFORE, be it hereby resolved by the Association of City Employees, after long and mature deliberation, that the Association of City Employees expresses its resolute opposition to the hiring of Negroes in the classified service of the City of Birmingham". The Fraternal Order of Police campaigned long and hard against the hiring of blacks and also passed a similar resolution. The Confederate flag is still periodically flown at the FOP lodge. The Birmingham Firefighters Association attacked the decree at the fairness hearing and continues to lead the employee unions' attack against it. These were the same unions that former Mayor David Vann in 1978 refused to recognize and negotiate with until they agreed to admit blacks into membership. To my knowledge, these almost exclusively white unions have never had a black serving in an elected position or other positions of union responsibility. And yet, less than three weeks ago, the Justice Department, in the name of Mr. Reynolds, moved the Court to join the attack on the Decree as a co-plaintiff with BACE, the same organization which fought against any blacks ever joining the civil service of the City of Birmingham.

Defending our lawful actions under the Consent Decree has already cost the City taxpayers over $200,000 and will cost hundreds of thousands of dollars more if these attacks continue. Unlike the Justice Department, we are honoring our commitment to defend the decree against attack. The Justice Department's actions are resulting in a shameful waste and totally unnecessary use of City and Federal money. It is even more distressing in a period of declining federal revenues to the City. The money the City must spend fighting the Justice Department's efforts to undermine the Decree could be better spent in funding badly needed jobs for blacks and whites, men and women to better serve the needs of all Birmingham residents.

Despite the efforts of the Justice Department to render the decree ineffective, the consent decree is working. It has enhanced the opportunity for blacks and females to be hired and promoted. And it has not done so at the expense of white males. Let me cite the hiring and promotion statistics under the consent decree for our Police and Fire Departments. We have hired 130 police officers of which 67 were white and 63 black; 92 were male and 38 female. There have been 50 police sergeant promotions -- 27 white and 23 black; 38 male and 12 female. Of the 10 lieutenant promotions, 7 were white and 3 black; 9 were male and 1 was female. No other promotions have been made in the Police Department. In the Fire Department we have hired 85 firefighters of which 47 were white and 38 black; 82 male and 3 female (prior to the consent decree no females had been employed). There have been 29 fire lieutenant promotions, 17 white and 12 black. We have made 10 captain promotions, 9 black and 1 white. Absent the consent decree, this modest progress would not have been made.

The consent decree must not be abolished. It is sound and necessary public policy. It is the only mechanism available to the City to assure equal employment opportunity. We have clearly demonstrated with promotions made under the decree that Personnel Board promotional tests are not valid for rank order purposes. Selectively certified blacks and females have clearly demonstrated their ability to perform the higher level jobs as efficiently as white males. The ultimate test is the test of job performance. In the absence of the consent decree we would, in my opinion, be subject to new charges of race and sex discrimination given the nature of the civil service system. The civil service system, with heavy emphasis on seniority in the system (as opposed to seniority in a particular job), restrictive certification procedures and imperfect testing methods, would immediately place us in the position we were in prior to the Consent Decree. The City's liability for employment discrimination against blacks and women would be real and substantial, and we would be powerless, under the civil service system, to do anything about it.

Birmingham, Alabama, as everyone knows, has had a long, oppressive and tortuous history of racial discrimination. As previously indicated in these remarks, the Birmingham Consent Decree has been the instrument by which the City has at least been able to make a modest beginning in fair employment practices as the same are mandated by the Civil Rights Act to us in Birmingham. It is unconscionable that the present Chief of the Civil Rights Division of the U.S. Justice Department should seek to destroy the City's Consent Decree -- a Decree which his department wrote and solemnly committed itself to defend. For these and all the other reasons I've cited, we are firmly opposed to Mr. Reynolds' confirmation as Associate Attorney General by the Senate.

Thank you.

Senator METZENBAUM. Now we will move to Susan Liss, director of the judicial selection project.

Senator HEFLIN. Can Mr. Graham be excused? He has a plane to catch.

Senator METZENBAUM. As a matter of fact, if he does not leave now, we are going to find him guilty of bad faith, because we put him in early so he could leave.

Mr. GRAHAM. Thank you.

Senator METZENBAUM. Ms. Liss.

STATEMENT OF SUSAN M. LISS

Ms. LISS. I am Susan Liss, director of the judicial selection project. Thank you for the opportunity to appear before you today.

The judicial selection project is a coalition of lawyers, academics, and representatives of civil rights, labor, and public interest groups that was formed early this year to monitor appointments to the Federal courts. The project reviews nominees' backgrounds on issues such as access to the courts, their records of equity and fairness, commitment to equal justice, pro bono activities, and membership in clubs that discriminate.

A number of members of the project have appeared before you today to urge you not to confirm Mr. Reynolds. While the project is seriously troubled about Mr. Reynolds' record, we have taken no position on his nomination.

We are here today, rather, to raise several concerns about the administration's process of selecting Federal judges. This is because of our understanding that, if confirmed, Mr. Reynolds will oversee the Justice Department's Office of Legal Policy which processes judicial appointments, and will sit on the Presidential Judicial Selection Committee which makes the final decisions on who should be nominated.

We were gratified that this morning Senator Simon and Senator Kennedy asked Mr. Reynolds about the administration's policies, and I would like to raise a few other concerns with you this afternoon.

First, it has become increasingly clear, that either directly or indirectly, the administration is using an ideological litmus test to screen candidates for judicial appointments. By using such methods, the administration is in effect seeking assurances from a candidate on how he or she will rule on specific issues. For nominees to provide such assurances destroys the impartiality that a judge must have in order to make fair decisions. I cannot emphasize too strongly our belief that these litmus tests pose the greatest threat to the integrity of the Federal courts.

Second, we are troubled by the paucity of women and minorities being appointed to the courts. Administration officials have publicly acknowledged that they have had difficulty finding women and minorities who possess the requisite ideology. We believe that diversifying the Federal bench to better reflect the breadth of our citizenry is essential, if our courts are to merit the respect of all citizens.

Third, we are concerned about the processes that are being used to select nominees. In place of the bipartisan merit selection panels used during the prior administration, this administration is relying on an old boy network in which politics and ideology take precedence over merit. Bar associations other than the ABA are no longer consulted to identify qualified candidates nor asked to evaluate nominess.

Senator METZENBAUM. You did say the ABA and not the ADA?

Ms. LISS. ABA.

Womens' and minority organizations, which have in the past played a major role in identifying potential candidates and in evaluating nominees, are now completely excluded from the process. The result has been a return to a pattern of overwhelmingly white male appointments.

Trust in the courts can only be maintained if citizens feel confident that those selected to become Federal judges will be able to judge others holding differing views with fairness. Decisions must be rendered not based on personal ideology but dispassionately and according to the law. The administration's current standards for selecting judges do not reflect a commitment either to fundamental fairness or to an independent judiciary.

Mr. Reynolds will have the opportunity, if confirmed, to shift the direction of the administration's judicial selection process, and we urge him to do so.

The unique role of the courts has been maintained over two centuries only because of public confidence in the fairness of our justice system. We cannot allow that to be destroyed. Thank you.

[The statement follows:]

TESTIMONY
of the
JUDICIAL SELECTION PROJECT

I am Susan M. Liss, Director of the Judicial Selection Project. Thank you for the opportunity to appear before this Committee today.

The Judicial Selection Project is a coalition of lawyers, academics, and representatives of civil rights, labor and public interest groups that was formed early this year to monitor appointments to the federal courts. The project reviews nominees' backgrounds on issues such as access to the courts, their records of equity and fairness, commitment to equal justice, pro bono activities, and membership in clubs that discriminate.

We believe that maintaining an independent judiciary is essential in our democratic system. However, we are deeply concerned about that independence in light of recent developments which demonstrate that judicial appointments are based increasingly on ideological fitness rather than merit.

It is the Project's understanding that, if confirmed, Mr. Reynolds will oversee the Justice Department's Office of Legal Policy, which processes judicial appointments, and will sit on the Presidential Judicial Selection Committee, which makes the final decisions on who should be nominated. We therefore urge this Committee to take this opportunity to question Mr. Reynolds about the role he will play and about the administration's process of selecting federal judges.

In light of Mr. Reynolds' likely participation in the process of filling the large number of current vacancies, we believe that it is also appropriate to focus attention at this time on the standards that should be used in selecting judges, in order to ensure that the courts remain a forum deserving of the public's trust.

As you are no doubt aware, by a historic twist of fate, this administration will have the opportunity to appoint over one-half of all federal judges by 1988. There are currently close to 100 vacancies. We have several concerns about the administration's efforts to fill those vacancies:

First, it has become increasingly clear that, either directly or indirectly, the administration is using an ideological litmus test to screen candidates for judicial appointments. By using such methods, the administration is, in effect, seeking assurances from a candidate on how he or she will rule on specific issues. For nominees to provide such assurances destroys the impartiality that a judge must have in order to make fair decisions. I cannot emphasize too strongly our belief that these litmus tests pose the greatest threat to the integrity of the federal courts.

Second, we are troubled by the paucity of women and minorities being appointed to the courts. Administration officials have publicly acknowleged that they have had difficulty finding women and minorities who possess the requisite ideology. We believe that diversifying the federal bench to better reflect the breadth of our citizenry is essential if our courts are to merit the respect of all citizens.

Third, we are concerned about the processes that are being used to select nominees. In place of the bipartisan merit selection panels used during the prior administration, this administration reverted to relying on an "old boy" network in which politics and ideology take precedence over merit. Bar associations other than the ABA are no longer consulted to identify qualified candidates, nor asked to evaluate nominees. Womens' and minority organizations, which have in the past played a major role in identifying potential candidates and in evaluating nominees, are now excluded from the process. The result has been a return to a pattern of overwhelmingly white, male appointments.

The federal courts hold a unique position in our constitutional system, ensuring that minorities and other citizens without political power have a forum in which to vindicate their rights. Because of this unique role, it is essential that the people selected to be federal judges respect the basic tenets of our legal system: respect for individual rights and a commitment to equal justice for all.

Trust in the courts can only be maintained if citizens feel confident that those selected to become federal judges will be able to judge others holding differing views with fairness. Decisions must be rendered not based on personal ideology, but dispassionately and according to the law.

As we have pointed out today, the administration's current standards for selecting judges do not reflect a commitment either to fundamental fairness or to an independent judiciary. Mr. Reynolds will have the opportunity to shift the direction of the administration's judicial selection process, and we urge him to do so. Much more is at stake than simple politics.

The unique role of the courts has been maintained over two centuries only because of public confidence in the fairness of our justice system. We cannot allow that to be destroyed.

Senator MATHIAS [presiding]. I understand all members of the panel have now testified. The committee would like to thank you for your attendance here today, and for the testimony you have given. Thank you very much.

Because of the hour, the Chair understands that some of the witnesses who had been scheduled to testify may have left.

Could we have a showing of hands of all those in the room who still intend to testify? If everybody would hold your hands up we can get a tally. We see seven hands, and I believe that the witness table will accommodate all seven. So, if you will all come forward.

I presume that these are members of what had been scheduled to be panels 7, 8, and 9, and there may be one from 6.

Before you sit down, I will ask you all to stand and raise your right hand.

[The witnesses were sworn.]

The record will show that the witnesses were duly sworn.

Ralph, do you want to start?

TESTIMONY OF A PANEL INCLUDING JUDITH LICHTMAN, EXECUTIVE DIRECTOR, WOMEN'S LEGAL DEFENSE FUND, WASHINGTON, DC; RALPH G. NEAS, EXECUTIVE DIRECTOR, LEADERSHIP CONFERENCE ON CIVIL RIGHTS, WASHINGTON, DC; PHYLLIS McCLURE, DEPUTY DIRECTOR, DIVISION OF LEGAL INFORMATION AND COMMUNITY SERVICE, NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, WASHINGTON, DC; MARTIN E. SLOANE, NATIONAL COMMITTEE AGAINST DISCRIMINATION IN HOUSING, WASHINGTON, DC; ELLIOT M. MINCBERG ON BEHALF OF WASHINGTON COUNCIL OF LAWYERS; LAURA D. BLACKBURNE, NEW YORK STATE CONFERENCE, NAACP; ESMERALDA SIMMONS, ACTING FIRST DEPUTY COMMISSIONER, STATE OF NEW YORK DIVISION OF HUMAN RIGHTS; RONALD E. HAMPTON, NATIONAL CHAIRMAN, NATIONAL BLACK POLICE ASSOCIATION

Senator Mathias. Although the witness is well known to the Chair, I will ask him to identify himself and each of you to identify yourselves for the benefit of the reporter.

Mr. Neas. Mr. Chairman, can I defer to Judith Lichtman to be first and I will be second?

Judith, do you want to start?

Ms. Lichtman. I am Judith Lichtman and I am the executive director of the Women's Legal Defense Fund, and I have a full statement to put into the record, if you will, Senator, and I will just briefly as I can——

Senator Mathias. Without exception, your full statement and the full written statements of each witness will be included as part of the record.

Ms. Lichtman. Thank you.

Senator Mathias. I make that ruling now for the whole panel.

Ms. Lichtman. Thank you.

My attempts, I think, and why Ralph asked if I would go first to put some of our discussion in some perspective.

In the summer of 1984, the Supreme Court came down with an opinion in a case we call *Stotts, Stotts* v. *Firefighters Local,* and Brad Reynolds hailed that opinion as his legal authority for attacking affirmative action.

Stotts dealt with the power of a district court to override a bona fide seniority system in order to preserve minority representation in the Memphis Firefighters Department in the face of layoffs. The administration incorrectly read *Stotts* as prohibiting all race- and sex-conscious measures, and embarked immediately upon a concerted program to review existing consent decrees in long-settled cases in order to eliminate such measures.

Mr. Reynolds contacted 51 State and local governments who are parties to those decrees, asking them to revise them voluntarily to eliminate the goals that had been negotiated and implemented in good faith.

Where there was no voluntary cooperation, Mr. Reynolds indicated that he would petition the courts to reopen the cases and to revise the decrees. Indeed, he has done so in several cities, including Indianapolis and Chicago.

The Justice Department's action completely disrupts programs to ensure equal employment opportunity. It undoes years of work already accomplished by the Department by those State and local governments, again in good faith. If successful, the Justice Department, with Mr. Reynolds at its helm, will reestablish barriers to employment and promotion for qualified women and minority males. It will signal to all employers that race- and sex-based discrimination is permissible.

And, in conclusion, I want to read to you from Mr. Reynolds' own statement before a Senate committee here in 1981, and I can give you the cities long after my 4 minutes have run.

In a different context, to be sure, he was talking about school desegregation, but I think what he said is really most applicable, and I want someone, in further questioning, to ask him how he squares his views in 1981 with his views today.

In 1981, he said, we do not contemplate routinely reopening decrees that have proved effective in fact. The law generally recognizes the special interest in the finality of judgment and that interest is particularly strong in the area of school segregation. Nothing we have learned in the 10 years since *Swann,* another Supreme Court case, leads to the conclusion that the public would be well served by reopening wounds that have long since healed.

I submit to you that there is nothing very different between the areas of employment discrimination and long settled laws. The wounds that have been opened by Mr. Reynolds by those 51, if you please, are indeed truly reprehensible, and someone should ask him quite pointedly before he is confirmed about his change in his position.

Thank you.

[Statement follows:]

STATEMENT OF
THE WOMEN'S LEGAL DEFENSE FUND
ON THE NOMINATION OF
WILLIAM BRADFORD REYNOLDS
FOR ASSOCIATE ATTORNEY GENERAL

June 5, 1985

The Women's Legal Defense Fund appreciates this opportunity to voice our opposition to the nomination of William Bradford Reynolds for Associate Attorney General.

The Women's Legal Defense Fund is a private non-profit organization with over 1500 members, most of whom are attorneys. WLDF was founded in 1971 to eliminate discrimination on the basis of sex through advocacy before governmental agencies, *pro bono* representation of individuals, and public education.

We oppose Mr. Reynolds because as the Assistant Attorney General for Civil Rights he has actively engaged in a campaign to reverse the gains achieved by decades of strong EEO and civil rights enforcement. This morning we will focus specifically on the issue of affirmative action and how Mr. Reynolds has chosen to implement Reagan Administration policies in this area.

"Affirmative action" is a term which is, of course, susceptible to a number of meanings. It has been defined by the U.S. Commission on Civil Rights as:

> ...[A]ny measure, beyond simple termination of a discriminatory practice, adopted to correct or compensate for past or present discrimination from recurring in the future.[1]

The Women's Legal Defense Fund of course supports such measures. Experience has shown, however, that certain kinds of affirmative action are more effective than others. For purposes of this discussion we want to focus on those measures that utilize goals and timetables or other kinds of numerical measures as motivators. Thus, when we refer to "affirmative action," we mean:

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[1] U.S. Commission on Civil Rights, "Statement on Affirmative Action," p. 2 (1977).

> A carefully delineated program of race-, sex-, or national origin-conscious action, where success is measured against numerical criteria, and which is designed to create meaningful opportunities for those who are members of identifiable classes that have historically been the subject of pervasive, entrenched discrimination and segregation.

Affirmative action as we perceive it is not about strict proportional representation of individuals in a particular workplace. It is about maximum utilization of resources that historically have gone untapped, and the provision of opportunities for qualified individuals to prove themselves in the workplace.

Affirmative action utilizing race- and sex-conscious measures works. For example, recently completed studies indicate that the enforcement of Executive Order 11246, as amended, has resulted in the increased presence of minority males and women in federal contractors' workforces. Executive Order 11246, as amended, generally prohibits discrimination by federal contractors, and further, mandates that federal contractors use affirmative action concerning minority males and women in their workforces. In 1981 the OFCCP commissioned a study entitled "A Review of the Effect of the Executive Order 11246 and the Federal Contract Compliance Program on the Employment Opportunities of Minorities and Women." The study was conducted by V. Griffin Crump, special assistant to then OFCCP Director Ellen Shong Bergman (the "Crump study"). The study was released by OFCCP in June of 1984. Also useful is a study entitled "The impact of Affirmative Action" by Professor Jonathon Leonard of the School of Business Administration of the University of California at Berkeley (the "Leonard study"). This study was completed in 1983. The major premise of the Crump study was that "federal contractor establishments as a group should, over a period of time show greater changes in...participation rates."[2] "Participation rates" as used in the Crump study means the proportion of women or minorities in a particular occupational category. The study conducted by Jonathon Leonard also compares the status of women and minorities in contractor and noncontractor establishments.

Both Leonard and Crump look at the performance data of contractor establishments during the period of 1974 through 1980. The Crump study notes that this period was chosen because it utilized the most reliable current data (1980 EEO-1 reports) and coincided with the implementation of the requirement of written affirmative action plans, which began in 1971, and the implementation of compliance activity regarding equal employment opportunity for women, which began in 1972.

Both studies conclude that the employment status of women and minorities has improved in companies that are covered by the Executive Order program. Crump concludes that "Executive Order establishments posted significantly greater gains in employment and advancement of women and minorities than those not covered..."[3] Leonard finds that "[t]he federal contract compliance program has substantially improved employment opportunities for blacks,"[4] and that contract compliance has had a positive impact on both minority and female employment between 1974 and 1980.[5] Leonard also points to litigation under Title VII brought by the Justice Department and EEOC, as well as the private bar, as a positive factor in improving the employment status of minority males and women. A study published by the Potomac Institute entitled "A Decade of New Opportunity...Affirmative Action in the 1970's" also concludes that affirmative action has been a positive factor in improving the employment status of minorities and women. The author of the study notes in the summary of findings that:

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[2] Crump study, p. 32.

[3] Crump study, p. 37.

[4] Leonard study, p. 144.

> ...[A]t the end of the decade [the 1970's] both minorities and women had greater employment in higher-paid jobs, where they had traditionally been under-represented, than at the beginning. This was true in all sectors that we examined -- private employment, government employment in both the federal and the state and local spheres, to some extent in institutions of higher education...and in apprenticeships and union membership in the construction industry....[T]he gains...represent a good start in the direction of equal employment opportunity, though not its final achievement. The achievements of equal employment opportunity have not yet neared the levels that would justify dismantling of the governmental machinery that made them possible.[6]

In its role both as chief lawyer for the Government and as a statutorily mandated public prosecutor of employment discrimination cases, the Department of Justice has traditionally been in the forefront of enforcing the mandate of equal employment opportunity contained in Title VII of the Civil Rights Act of 1964.

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[5] Leonard study, p. 362. Neither Leonard nor Crump deal specifically with the progress achieved by minority women as a separate category.

[6] Herbert Hammerman, "A Decade of New Opportunity, Affirmative Action in the 1970's," The Potomac Institute, (October 1984), p. 5.

Former Assistant Attorney General for Civil Rights Bradford Reynolds has adopted policies that reverse this tradition. Mr. Reynolds stated at the beginning of his tenure as the Assistant Attorney General for Civil Rights that the Justice Department would abandon the advocacy of goals and timetables as a remedy to correct systemic discrimination in employment discrimination suits.[7] Even when the Department has proved in court that an employer has engaged in a pattern or practice of discrimination, it no longer urges or in any way supports "the use of quotas or any other numerical or statistical formulae designed to provide to non-victims of discrimination preferential treatment based on race, sex, national origin or religion."[8]

Pursuant to this announced policy, consent decrees signed by the Justice Department since 1981 have failed to include goals for hiring and promotion, although such goals had been retained for recruitment. We have learned recently that consent decrees being negotiated by Justice at this time fail to include even recruitment goals.

Mr. Reynolds attempts to justify this shift, first, by claiming that remedies that exclude goals and timetables are sufficient to eliminate even systemic patterns of discrimination; and, second, by asserting that the Constitution's "color-blind ideal of equal opportunity for all" requires it. The first claim is belied by over 20 years of EEO enforcement, including the activities of both Republican and Democratic administrations. The second claim is simply contrary to the Supreme Court decisions on affirmative action.[9/]

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[7] Testimony of William Bradford Reynolds before the House Subcommittee on Employment Opportunities (September 23, 1981) pp. 5, 13-16.

[8] Ibid. See also, Remarks of William Bradford Reynolds before the Fourth Annual Conference on EEO, "Recent Developments in Federal Regulations and Case Law" (October 20, 1981) p. 3.

The Justice Department has never offered factual support for this policy retreat. Mr. Reynolds has neither presented any evidence that affirmative action policies that are race- and sex-conscious actually have operated to disadvantage white males' opportunities in the labor market, nor has he shown how instances of proven discrimination can effectively be remedied without any race- or sex-conscious remedies. Experience has shown these to be effective. Objective studies have found these to be effective. Mr. Reynolds' proposed change in midstream to ineffective methods is thus illogical, counterproductive, and a waste of departmental resources. More importantly, such a policy change will have a detrimental impact on the employment status of women and minorities.

When in the summer of 1984 the Supreme Court decided Stotts v. Firefighters Local 1784 468 U.S. ___, 104 S.Ct. 2576, 34 FEP Cases 1702, the Reagan administration hailed this decision as legal authority for its attack on affirmative action. Stotts dealt with the power of a district court to override a bona fide seniority system in order to preserve minority representation in the Memphis Fire Department in the face of layoffs. The administration

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[9/] The Supreme Court has upheld the use of race-conscious programs in education, contracting, and employment. See Regents of California v. Bakke, 438 U.S. 265 (1978); United Steelworkers v. Weber, 443 U.S. 193 (1979); Fullilove v. Klutznick, 448 U.S. 448 (1980).

incorrectly reads Stotts as prohibiting all race- and sex-conscious measures.[10] Thus, claiming to be authorized by Stotts, the Justice Department immediately began to do more than simply settle cases of employment discrimination without insisting on effective remedies; it embarked upon a concerted program to review existing consent decrees in long-settled cases in order to eliminate such measures. As part of this program the Justice Department has contacted 51 state and local governments who are parties to these decrees, asking them to revise these decrees voluntarily to eliminate the goals that had been negotiated and implemented. Where there is not voluntary cooperation, Mr. Reynolds has indicated that the Justice Department will petition the federal courts to re-open the cases and to revise the agreements. Indeed, the Justice Department has already done so in several cities, including Indianapolis and Chicago. This phase of the Department's attack on effective EEO enforcement thus completely disrupts existing programs to ensure equal employment opportunity. Further, it undoes years of work already accomplished by the Department and by state and local governments in good faith. Finally, this activity wastes precious departmental resources on revising decrees that do not require revision and that have been achieved by the parties after years of expensive, time-consuming litigation and negotiation. In a time when federal resources are scarce, it is indefensible to expend them in cases in which no party has asked for the Justice Department's intervention. This diversion of resources can only hamper the ability of the Department to fulfill its mandated obligation to enforce anti-discrimination laws on behalf of women and people of color.

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[10] The opinion in Stotts in no way precludes the use of race- or sex-conscious relief. The majority did not even mention its prior rulings on affirmative action, let alone announce any modification of the legal principles established by those cases. Certainly, the opinion left open the question of whether the City of Memphis could have acted voluntarily to assure the retention of minorities during a layoff. Finally, Blackmun's dissent noted that Stotts is a statement that the race-conscious relief in this case was broader than necessary, not that race conscious relief is never appropriate.

Another, more fundamental concern is that the actions of the Justice Department, if successful, will re-establish barriers to employment and promotion for qualified women and minority males in the cases involved and will signal to all employers that race- and sex-based discrimination is permissible. Years of EEO enforcement and litigation activity have taught employers and advocates alike that it is the use of reasonable goals for employment and promotion that leads to the full utilization of heretofore untapped resources. It is apparent to us that the goals in existing consent decrees were established precisely because the parties and the courts felt they were necessary to achieve equal employment for the people formerly excluded.

It is important to point out that the remedies in the decrees under review are not limited to goals and timetables for minority males. Our review of the consent decrees that the Department is challenging reveals of the 51 jurisdictions contacted, 35 have decrees which include specific goals for women.[11] Further, we assume that in cases where no goals for women are specified, goals for "minorities" include minority women. Women, therefore, will suffer in every case in which Justice involves itself on behalf of white males.

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[11] The list of decrees which specifically include goals for women is attached as Appendix 1.

Another, very recent, development in Justice Department policy in this area appears to be an attack on the Uniform Guidelines for Employee Selection. Indeed the new policy is an apparent attack on the whole notion, adopted by the Supreme Court in Griggs v. Duke Power Co. 401 U.S. 424 (1971) that general intelligence tests and other criteria for employment that have a statistically significant adverse impact on members of a protected class may not be used unless they are proven to be valid predictors of job performance. In at least one case of which we are aware, Mr. Reynolds has rejected the findings of his staff lawyers that a written test given by a jurisdiction for employment of police officers has an adverse impact on blacks and Hispanics, is not job related, and therefore violative of Title VII of the Civil Rights Act of 1964. In summarily rejecting the extensive recommendations of his staff, Mr. Reynolds ignores the Griggs doctrine completely. If the Justice Department, in defiance of established Supreme Court precedent, does not challenge this test, it will once again be ignoring its mandate to enforce the anti-discrimination laws as they have been interpreted by the courts. And once again, the losers will be minority males and women.

The Women's Legal Defense Fund maintains that race- and sex-conscious measures, including goals and timetables, are required to attack the systemic discrimination from which women and minority males suffer. Merely calling for color blind and gender neutral policies does not eliminate discrimination. Such policies serve only to reverse the gains that women have achieved, and will return us to a time when women or minority males "need not apply," either for hire or promotion.

As the Assistant Attorney General for Civil Rights, William Bradford Reynolds has repeatedly attacked the hard-won gains of minority males and women, the handicapped and the aged. We have no reason to believe that his tactics or his targets will change if he is confirmed as Associate Attorney General. As an organization founded to eliminate discrimination, therefore, we must oppose his confirmation. We urge members of the Senate to do the same.

APPENDIX I

Consent Decrees That Include Specific Goals for Women

1. **City of Alexandria** C.A. 77-2040
2. Arkansas C.A. LR-C-78-25
   (Arkansas State Police)
3. Baltimore County C.A. H-78-836
4. City of Buffalo C.A. 73-414
5. City of Chicago C.A. 73-C-2080
6. City of Cincinnati, et al. C.A. C-1-80-369
7. Cobb County Public Schools et al. C.A. C80-301 A
8. State of Florida, et al. C.A. TCA-79-0927
9. Woburn, Mass. School Committee, et al. C.A. 75-4552-C
10. State of New Jersey, et al. C.A. 75-1734
11. City of Norfolk C.A. 78-78-418-N
12. State of New York C.A. 77-CV-343
13. City of Jackson, Mississippi C.A. J-74-66
14. San Diego County C.A. 76-1094-S
15. City of San Diego, et al. C.A. 76-1093-S
16. U. S. v. Pinellas County C.A. 80-849 T.H.
17. The Metropolitan Government of Nashville and Davidson County, et al. C.A. 80-3155
18. City of Memphis, et al. C.A. 74-286
19. City and County of San Francisco C.A. 77-2884 RFP
20. Village of Schiller Park, et al., C.A. 78C-2329
21. City of Milwaukee C.A. 78-C-163
22. City of Milwaukee (Police Department Interim Order) C.A. 74-C-480
23. City of Miami C.A. 75-3096
24. Ohio State Highway Patrol C.A. C-2-80-439

25.	County of Waukesha	C.A. 80-C-140
26.	City of Los Angeles (Fire Dept.)	C.A. 72-1806
	" " " " (Police Dept.)	C.A. 77-1986
27.	State of North Carolina, et al.	C.A. 75-0328-CIV-5
28.	City of Philadelphia	C.A. 74-400
29.	Onondaga County, et al.	C.A. 80-CV-356
30.	City of Syracuse	C.A. 80-CV-53
31.	City of Pompano Beach	C.A. 76-1059-CIV-MCR
32.	City of Indianapolis	C.A. IP-78-388-C
33.	State of Maryland	C.A. 74-8
34.	City of Wichita Falls, Texas et al.	C.A. 7-57-31
35.	Maryland Transportation Authority	C.A. H-81-1072
36.	City of Fort Lauderdale	C.A. 88 (or 80) 6289-CIV-JCP

Senator MATHIAS. I think he was pressing it in 1981.
Mr. Neas.

STATEMENT OF RALPH G. NEAS

Mr. NEAS. Thank you, Mr. Chairman.

My name is Ralph G. Neas. I am the executive director of the Leadership Conference on Civil Rights, a coalition of 175 national organizations. On behalf of the conference, I want to thank you for the opportunity to testify today.

The Leadership Conference strongly opposes the confirmation of William Bradford Reynolds to be Associate Attorney General of the United States.

In the course of its 35 years, the conference has only rarely taken a position on a presidential nomination. But the record that Mr. Reynolds has compiled as Assistant Attorney General for Civil Rights compels us to oppose his confirmation.

To be blunt, as well as accurate, the Reynolds' record has been a disgrace. In his 4 years at the Department of Justice, he has repeatedly repudicated the enforcement policies of the previous six Republican and Democratic administrations. He has consistently ignored the intent of Congress when it enacted the Nation's civil rights laws. And he has routinely defied the decisions of the Federal Judiciary.

For the past several years, Mr. Reynolds has maintained that the only real substantive differences between him and his critics are disagreements over the remedies of busing and quotas. Furthermore, Mr. Reynolds has stated often that the Department of Justice has achieved the best civil rights enforcement record ever.

Such assertions are Orwellian in their inaccuracy. Mr. Reynolds uses the issues of busing and quotas as a smokescreen to mask the worst civil rights record of any administration in more than half a century. Mr. Reynolds has seized every opportunity to weaken our civil rights laws. He has made every effort to restrict remedies that have long been available to victims of unlawful discrimination.

And these regressive actions have been in virtually every area of civil rights enforcement. Laws prohibiting discrimination in housing, in the funding of Federal programs, in voting, in education, and in employment have all been the target of Mr. Reynolds' relentless attempts to turn back the clock on civil rights enforcement. Indeed, the record has been so bad that our Nation faces the very real threat of a second post reconstruction. The civil rights accomplishments of the past three decades, which constitute one of the proudest chapters in American history, are in serious jeopardy.

I want to emphasize that the principal reason for our opposition to the confirmation of Mr. Reynolds to be Associate Attorney General is based upon our belief that Mr. Reynolds has not acted consistently with the binding oath he took "to support this Constitution."

Under our constitutional scheme of government, the President is charged with the duty to take care that the laws be faithfully executed. The Department of Justice is the principal instrumentality for carrying out that responsibility. The basic limitations on the Department of Justice under our constitutional framework are also clear. Simply stated, the Department of Justice and its officers do not make the law, a power which belongs to Congress. Nor does the Department of Justice definitively interpret the Constitution and laws, a power which resides in the Supreme Court. Rather, as part of the executive branch, the Department of Justice has the primary duty of enforcing the law.

As Assistant Attorney General for Civil Rights, Mr. Reynolds has not been enforcing the laws as passed by Congress and as interpreted by the courts. Rather, Mr. Reynolds has unilaterally decided to enforce those laws and court decisions with which he agrees and to ignore or deny those with which he disagrees. As Assistant Attorney General for Civil Rights, Mr. Reynolds has governed not by the rule of law, but by executive fiat.

In sum, Mr. Reynolds has been the principal architect of a comprehensive assault on our civil rights laws. His rigid rightwing ideology has produced extremist policies that conflict radically with the bipartisan consensus on civil rights in this country. But, most importantly, Mr. Reynolds has repeatedly acted in defiance of the Federal judiciary and the Congress. The proper question before the Congress is not whether Mr. Reynolds should be promoted. Rather, it is whether he should be allowed to remain in office at all.

Mr. Chairman, the Leadership Conference requests that the Senate Judiciary Committee oppose the confirmation of Mr. Reynolds to be Associate Attorney General of the United States.

Thank you.

[Statement follows:]

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STATEMENT OF THE LEADERSHIP CONFERENCE ON CIVIL RIGHTS OPPOSING THE CONFIRMATION OF W. BRADFORD REYNOLDS TO BE ASSOCIATE ATTORNEY GENERAL

Ralph G. Neas, Executive Director

June 5, 1985

Mr. Chairman and members of the Committee, my name is Ralph G. Neas. I am the Executive Director of the Leadership Conference on Civil Rights, a coalition of 175 national organizations representing minorities, women, the disabled, senior citizens, labor, religious groups, and minority businesses and professions. On behalf of the Conference, I want to thank the Committee for allowing us the opportunity to testify today.

The Leadership Conference strongly opposes the confirmation of William Bradford Reynolds to be Associate Attorney General of the United States.

In the course of its thirty-five years, the Conference has only rarely taken a position on a presidential nomination. But the record that Mr. Reynolds has compiled as Assistant Attorney General for Civil Rights compels us to oppose his confirmation.

To be blunt, as well as accurate, the Reynolds record has been a disgrace. In his four years at the Department of Justice, he has repeatedly repudiated the enforcement policies of the previous six Republican and Democratic administrations. He has consistently ignored the intent of Congress when it enacted the

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nation's civil rights laws. And he has routinely defied the decisions of the Federal Judiciary.

Because of the extremist policies and infidelity to the law that have characterized the tenure of Mr. Reynolds at the Justice Department, we ask the Senate to reject his nomination.

The Reynolds Record

For the past several years, Mr. Reynolds has maintained that the only real substantive differences between him and his critics are disagreements over the remedies of busing and quotas. Furthermore, Mr. Reynolds has stated often that the Department of Justice has achieved the best civil rights enforcement record ever.

Such assertions are Orwellian in their inaccuracy. Mr. Reynolds uses the issues of busing and quotas as a smokescreen to mask the worst civil rights record of any administration in more than half a century. Mr. Reynolds has seized every opportunity to weaken our civil rights laws. He has made every effort to restrict remedies that have long been available to victims of unlawful discrimination.

And these regressive actions have been in virtually every area of civil rights enforcement. Laws prohibiting discrimination in housing, in the funding of federal programs, in voting, in education, and in employment have all been the target of Mr. Reynolds' relentless attempts to turn back the clock on civil rights enforcement. Indeed, the record has been so bad that our nation faces the very real threat of a Second Post Reconstruction. The civil rights accomplishments of the past three decades, which constitute one of the proudest chapters in American history, are in serious jeopardy.

A. Defiance of the Law

The principal reason for our opposition to the confirmation of Mr. Reynolds to be Associate Attorney General of the United States is based upon our belief that Mr. Reynolds has not acted consistently with the binding oath he took "to support this Constitution."

Under our constitutional scheme of government, the President is charged with the duty to "take care that the laws be faithfully executed." The Department of Justice is the principal instrumentality for carrying out that responsibility. The basic limitations on the Department of Justice under our constitutional framework are also clear. Simply stated, the Department of Justice and its officers do not make the law (a power which belongs to Congress). Nor does the Department of Justice definitively interpret the Constitution and laws (a power which resides in the Supreme Court). Rather, as part of the Executive Branch, the Department of Justice has the primary duty of enforcing the law.

As Assistant Attorney General for Civil Rights, Mr. Reynolds has not been enforcing the laws as passed by Congress and as interpreted by the Courts. Rather, Mr. Reynolds has unilaterally decided to enforce those laws and court decisions with which he agrees and to ignore or defy those with which he disagrees. As Assistant Attorney General for Civil Rights, Mr. Reynolds has governed not by the rule of law, but by executive fiat.

The following discussion attempts only to focus on several of the many areas of civil rights where Mr. Reynolds has refused to enforce the law.

1. Bob Jones

The Bob Jones University fiasco was the first and one of the most illustrative examples of government by executive fiat. Thought by some to have been a management mistake or just an aberration, the Bob Jones incident actually set the standard for what has been the modus operandi of the Department of Justice.

On October 13, 1981, the Supreme Court granted review of two circuit court decisions which upheld Treasury Department regulations denying tax exempt status under the IRS code to two schools which practice racial discrimination in admissions and other policies. Goldsboro Christian Schools, Inc. v. U.S. (No. 81-1), 436 F. Supp. 1314 (E.D. N.C. 1977) offered without opinion, 644 F. 2d 874 (4th Cir. 1981); Bob Jones University v. U.S. (No 81-3), 639 F.2d 147 (4th Cir. 1980).

On January 8, 1982, the Department of Justice switched sides and asked the Supreme Court not to hear the cases in light of a new Treasury Department decision to change federal policy and allow such school's tax exempt status. In short, the United States changed its legal position and requested the Supreme Court to drop the case because there was no longer a controversy between the government and the discriminating schools.

While the Justice Department sought to portray its action as a simple change in Executive policy, that was definitely not the case. Rather, the Justice Department repudiated a congressional statute interpreted by the courts to bar tax exemptions to discriminatory private schools.

On June 30, 1971, a three judge district court in Green v. Connolly [330 F. Supp 1150 (D.D.C. 1971), aff'd., 404 U.S. 997 (1971) (per curiam)] ruled that the issuance of tax exempt status to racially discriminatory private schools was illegal and issued a permanent injunction enjoining the Commissioner of IRS from approving tax exempt status to any school in Mississippi that did not publicly maintain a policy of nondiscrimination.

Following the Supreme Court's affirmance without opinion in 1971, the IRS formalized the non-discrimination policy in a number of Revenue Rulings including Rev. Rul. 75-231, 1975-1 Com. Bull. 158 (which relates specifically to church operated schools).

For the following twelve years, the Nixon, Ford, and Carter Administrations enforced this well-settled federal policy. But then on January 8, 1982, the Department of Justice decided to remake the law by unilateral governmental action. In a single stroke, it ignored the Supreme Court's decision in Green (upholding the interpretations of tax law to deny exemptions to discriminatory institutions) and sought to prevent the Court from ruling on the particular issues involved in the Bob Jones case.

In the aftermath of the Administration's decision, it was revealed that the initiative for the government's action came from Mr. Reynolds and other Justice Department officials and that it was implemented over the objections of the Solicitor General's office and top Treasury Department officials.

In 1983, by an 8-1 vote, the Supreme Court repudiated the Department of Justice position.

2. School Desegregation

Perhaps the most flagrant example of Mr. Reynold's disrespect for the law has been his efforts to limit, if not eliminate, the federal government's efforts to desegregate schools. It is in this area -- where the Department's responsibility to protect the rights of students has been clear at least since 1964, and substantive constitutional law was established even earlier -- that the Justice Department has most explicitly rejected settled law and defaulted on its enforcement role.

The sharp conflict that the Justice Department has entered into with the courts is revealed most explicitly in the following quotations from Supreme Court decisions and from statements made by Assistant Attorney General William Bradford Reynolds:

- The Supreme Court: "The burden on a school board today is to come forward with a plan that promises to work realistically now... [I]f there are reasonably available other ways...promising speedier and more effective conversion to a unitary, non-racial system, 'freedom of choice' must be held unacceptable." [Green v. Board of New Kent County, 391 U.S. 430, 438, 439 (1968)].
- Mr. Reynolds: "We are not going to compel children who don't choose to have an integrated education to have one." [The New York Times, November 20, 1981, p. A14]
- The Supreme Court: "All things being equal, with no history of discrimination, it might well be desirable to assign pupils to schools nearest to their homes. But all things are not equal in a system that has been deliberately constructed and maintained to enforce racial segregation...[T]ransportation has been an integral part of the public education system for years...Desegregation

plans cannot be limited to the walk-in school." [Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 27-29 (1971)]

Mr. Reynolds: "We have concluded that involuntary busing has failed to advance the overriding goal of equal educational opportunity. Adherence to an experiment that has not withstood the test of experience obviously makes little sense." [Testimony before the House Subcommittee on Civil and Constitutional Rights, November 19, 1981]

o The Supreme Court: "In short, common sense dictates the conclusion that racially inspired school board actions have an impact beyond the particular schools that are the subjects of those actions. That is not to say, of course, that there can never be a case in which the geographical structure of, or the natural boundaries within, a school district may have the effect of dividing the district into separate, identifiable and unrelated units. Such a determination is essentially a question of fact to be resolved by the trial court in the first instance, but such cases must be rare." [Keyes v. School District No. 1, Denver, Colorado, 413 U.S. 189, 202 (1973) [emphasis added]

Mr. Reynolds: "In deciding to initiate litigation, we will not rely on the Keyes presumption but will define the violation precisely and seek to limit the remedy only to those schools in which racial imbalance is the product of intentionally segregative acts of school officials." [November 19, 1981 testimony, p. 13]

Mr. Reynolds has not openly disputed the proposition that state-imposed segregation is unconstitutional. However, he has either expressed his refusal to follow the law or distorted its current requirement. Most critically, he argues that, despite the role played by state authorities in creating dual systems and requiring students to attend racially separate schools, these officials need not be required to undo their wrong by reassigning students to desegregated schools. In Mr. Reynolds' view it will suffice if previously segregated students now are permitted to choose between segregated and desegregated schools. Thus, in direct contravention of settled law, reaffirmed by the Supreme Court most recently in 1979, _/ he has proposed to relieve state officials, who have created segregation, of their obligation to undo it. _/

Starting from this misconceived premise, other critical strands of administration policy follow: if state authorities have no responsibility more substantial than allowing students to choose to attend desegregated schools, reliance upon "voluntary" desegregation techniques is appropriate. Moreover, mandatory transfers, whether or not they entail busing, become unnecessary because state officials have no obligation to ensure that students are able to attend desegregated schools. Likewise, there is no need to be concerned with whether a system's schools are actually desegregated; student choice is the goal, not desegregated schools.

This position is directly contrary to the equal protection law developed during more than twenty-five years of litigation involving nearly 2,000 separate law-suits. Simply stated, state authorities have an *affirmative obligation* to dismantle dual systems and cannot pass this obligation off to students and parents. In furtherance of their affirmative constitutional duty, school authorities must utilize desegregation techniques which promise to work effectively. For example, if magnet schools can in fact replace formerly segregated schools with "just schools," they are constitutionally sufficient. However, their permissibility is determined, not by reference to a system's "good faith," but rather by the results achieved in dismantling its dual school system. Thus, if voluntary techniques do not promise expeditious and maximum desegregation, then mandatory desegregative re-assignments must be made to replace the previous mandatory segregative assignments. And, if these techniques require buses to get the students to their proper schools, buses may (indeed, must) be used.

The Department of Justice has sought to substitute for the constitutional imperative of eradicating state-imposed segregation a commitment that segregated black students are assured equal access to resources and staff. As justification, the Assistant Attorney General has suggested that a misplaced emphasis on school segregation has led to a neglect of educational quality._/

Nothing could be further from the truth. In many major school desegregation cases, plaintiffs have aggressively challenged educational inequality, and the Supreme Court has held that state and local authorities may be required to provide additional resources and services to students to compensate for past discrimination. _/ In other cases, plaintiffs have sought revision in state systems for financing public schools that shortchange students in poor and minority areas. _/

Further, Mr. Reynolds' suggestion that new attention to equalizing resources may serve as a substitute for desegregation betrays either ignorance of his Administration's successful efforts to reduce federal aid to poor and minority schools or a pervasive cynicism.

In any event, the proposal that minority schools be upgraded as a substitute for desegregation is a red herring. The heart of the *Brown* decision was a repudiation of the doctrine of "separate but equal" -- the claim by state authorities that if they assured that black and white schools were made tangibly equal in resources, they should be permitted to segregate them. Mr. Reynolds seeks to revive that discredited doctrine.

3. Fair Housing Act

The Attorney General's enforcement authority in the area of fair housing comes from the "Fair Housing Act," Title VIII of the 1968 Civil Rights Act. Federal courts and the Congress have repeatedly stated that a violation of the Act may be proven by showing either that an intentional act of discrimination has been committed or that actions complained of have had a discriminatory effect. This "effects test" is crucial to the vindication of civil rights in housing because of the variety of subtle discriminatory techniques that have been developed over the years.

As recently as 1980, during consideration of proposed Fair Housing Act Amendments, the Senate and House Judiciary Committees took note of the fact that the effects test is the law. _/ Four federal appeals courts have endorsed the same position._/ Every prior administration has conducted its fair housing litigation in a manner consistent with this understanding of the law.

In defiance of the clear legal standard, the Reagan Administration has taken upon itself to redefine the law to its liking. The "effects" test, previously utilized in much pending litigation, is being or has been deleted from Justice Department briefs and pleadings. The Division substituted the more difficult standard of intent in its suit against the City of Birmingham, Michigan. _/ The Division also employed the "effects" test at trial in a fair housing suit against Parma, Ohio, then failed to argue that aspect of the case on appeal. _/ Further, the Division lost its first housing case, when Division attorneys were ordered not to utilize the "effects" test.

4. Race Conscious Remedies

Mr. Reynolds constantly states that he is irrevocably opposed to race conscious remedies. He has maintained that race consciousness will "create...a racial spoils system in America."

Mr. Reynolds has even stated that the Fourteenth Amendment was intended to ban taking race into account for any purpose at all, and to ensure race neutrality. "That was why we fought the Civil War", he once told the New York Times. Once again Mr. Reynolds' Orwellian logic and revision of history surfaces.

Contrary to Mr. Reynolds' assertions, less than a month after Congress approved the Fourteenth Amendment in 1866, the very same Congress enacted eight laws exclusively for the freedmen, granting preferential benefits regarding land, education, banking facilities, hospitals, and more. No comparable programs existed or were established for whites. And Congress knew what it was doing. The racial preferences involved in those programs were vigorously debated with a vocal minority led by President Andrew Johnson, who argued that the preferences wrongly discriminated against whites.

All these governmental actions reflect the obvious point that, as Justice Harry Blackmun said in the Bakke case, "in order to get beyond racism, we must first take account of race. There is no other way." Chief Justice Warren Burger had made the point even clearer in a prophetic commentary on this administration's efforts to get the courts to ignore race when trying to remedy the ravages of past discrimination. Striking down in 1971 a North Carolina statute that barred considerations of race in school assignments, the Chief Justice said:

> "The statute exploits an apparently neutral form to control school assignments' plans by directing that they be "color blind"; that requirement, against the background of segregation, would render illusory the promise of Brown. Just as the race of students must be considered in determining whether a constitutional violation has occurred so also must race be considered in formulating a remedy...[color blindness] would deprive school authorities of the one tool [race consideration] absolutely essential to fulfillment of their constitutional obligation to eliminate existing dual school systems."
>
> [Emphasis added.]

I suspect Mr. Reynolds and other Reagan Administration officials can fully understand the statement of a White House official who, while denying that the Justice Department was failing to enforce the law, added "unless you call all of the decisions of the Supreme Court the law of the land."

With regard to the issue of a color blind society, everyone should heed the eloquent words of William Coleman, Secretary of Transportation in the Ford Administration:

> "For black Americans, racial equality is a tradition without a past. Perhaps, one day America will be color-blind. It takes an extraordinary ignorance of actual life in America today to believe that day has come...[For blacks], there is another American "tradition" -- one of slavery, segregation, bigotry, and injustice."

Mr. Reynolds may contend that the above criticisms are unfair because he has just been following orders. But the Assistant Attorney General for Civil Rights, while appointed by the President, cannot choose to follow the President's policies or philosophy when they are inconsistent with what is demanded by the law.

Indeed, since the Supreme Court's decision in Marbury v. Madison more than 180 years ago, it has been well established that officers of the Executive Branch do not operate with unfettered discretion, especially when constitutional rights are at stake. Mr. Reynolds' clear duty is to carry out the laws enacted by Congress and interpreted by the courts. To an unprecedented degree, Mr. Reynolds has refused to perform that duty.

B. Extremist Policies

While the issue of Mr. Reynolds' defiance of the law is paramount with respect to our opposition to his confirmation, it is also important to consider briefly his extremist policies in several important areas of civil rights enforcement.

1. Voting Rights

Everyone knows how Mr. Reynolds led the Administration's unsuccessful 1982 fight to defeat a strong and effective extension of the Voting Rights Act of 1965. But not everyone is familiar with his record regarding other voting rights issues.

Other witnesses will provide additional details, but I would just like to summarize some of the "lowlights."

First, enforcement of voting rights, which was already at a low level before the last election, has about petered out entirely. Thus far in 1985, the number of Section 5 objections is by far the lowest in the last fifteen years. And Section 2 cases are almost non-existent. It is true the Justice Department has filed several amicus briefs in voting rights cases in the Supreme Court and appellate courts, but every one of them has opposed the position of black voters (except for one which was only half-opposed, involving the Chicago City Council redistricting, where the Department's brief said the circuit court was wrong in its ruling in favor of the black voters but said the Supreme Court did not need to deal with the case until a later stage). In the criminal area, the Justice Department has conducted a dragnet involving charges of misuse of absentee ballots by black voters in Alabama, after ignoring similar charges involving white voters last year in Copiah County, Mississippi.

Second, Mr. Reynolds likes to tell a good story about his performance, but too many times his stories do not tell the truth. Last month, he appeared before the House Judiciary Committee on Justice budget authorization, and told about filing 53 suits to enforce the Voting Rights Act of 1965, including 26 "to correct violations of Section 2." We have combed the records to the best of our ability, and we can't find more than about half such suits.

In 1983, Mr. Reynolds went to Mississippi to look at violations in the county redistrictings before that year's statewide elections, and got good press coverage for singing "We Shall Overcome." But when staff attorneys, who thought he was sincere about wanting to "overcome Section 5 violations, recommended suits in twelve counties, he approved only one small case, where the County didn't even submit its change for Section 5 review. The other eleven just sat on his desk. He will tell you that there are private suits going on in those eleven cases, but that is not so. What happened is that when the election was almost about to take place, with no action from the Department, private lawyers, who were already stretched to the breaking point in two dozen _other_ cases, were forced to try to bring cases in the counties where it had been hoped the Department would act. A lifeguard who sits by watching people drown doesn't get credit if some of the near-victims are pulled out at the last minute by others.

Finally, there is a reprehensible pattern of his actions in his backroom political approvals of grossly discriminatory Section 5 changes. In repeated cases the same pattern occurs. First the staff recommends an objection. Then Reynolds has secret conversations with the local politicians who are responsible for the discrimination. And then Reynolds approves the change. This has happened most notably, in the Louisiana congressional redistricting (_Major_ v. _Treen_), and in the Montgomery, Alabama, city council redistricting (_Buskey_ v. _Oliver_). In both cases, the racial discrimination was unbelievably flagrant, to the point where voters were able to go to court afterwards, and win Section 2 decisions -- something which had never happened before Reynolds' time because it is usually understood that if the jurisdiction can pass the supposedly strict tests of Section 5, it would be hopeless for voters to try to win a Section 2 case.

Other witnesses will describe the details of these and other cases, but I think they underscore some of the basic reasons why Brad Reynolds should not be the next Associate Attorney General of the United States.

2. _Disability Law_

Mr. Reynolds has refused to enforce effectively the laws prohibiting discrimination based on handicapped status. Both with respect to Section 504 and to the Civil Rights of Institutionalized Persons Act, the record of Mr. Reynolds is woefully inadequate. An especially good analysis of the Reynolds Record can be found in the Senate Subcommittee on the Handicapped Staff Report filed this year at the request of Republican Senator Lowell Weicker. In that report, on page 5, it is noted that:

> "The U.S. Department of Justice continues to play a limited role in monitoring conditions in facilities for the mentally disabled as they relate to constitutional and federal statutory requirements...
>
> The Department's lack of timeliness and consistently conciliatory approach in the face of conditions determined to be egregious and flagrant abuses of the institutionalized mentally disabled, allow these conditions to fester, distorting the purpose of congressionally mandated intervention."

Regarding Section 504, with the exception of one or two filings, most of Mr. Reynolds' activities have been focused on trying to weaken the regulations issued pursuant to Section 504.

3. Grove City and the Restoration Act

Over the past two decades, the major civil rights statutes which prohibit federal funding of discrimination, (Title VI, Title IX, and Section 504) have been tremendously effective in desegregating our institutions and in expanding equality of opportunity for minorities, women, and disabled people. These laws, in addition to the Voting Rights Act of 1965, have been primarily responsible for what has been, in reality, a peaceful revolution to secure justice for millions of Americans.

One principal reason for the success of these statutes is that the four administrations prior to the Reagan Administration uniformly enforced these laws consistent with the intent of Congress and with the prevailing weight of judicial authority during the 1960's and 1970's. The Johnson, Ford, Carter, and Nixon Administrations all enforced these laws so that an entire institution was covered by these laws if any part of that institution received federal money.

But to the astonishment of some, the Department of Justice in the summer of 1983 under Mr. Reynolds' leadership, sought to reverse this twenty year old policy. He argued that only that part of an institution receiving federal monies should be covered by federal law.

Regrettably, the Supreme Court agreed with his interpretation. Thus, the law now permits the federal government to fund with federal dollars discrimination against women, minorities, the disabled and senior citizens.

To reverse the absurd and unconscionable situation created by the Grove City decision, substantial majorities of both the House and the Senate are trying to overturn the Supreme Court decision. But, so far, Brad Reynolds has done everything possible to defeat a strong and effective measure.

For some, Reynolds' present position may be puzzling to say the least. Apparently he now supports legislation (introduced by Senator Robert Dole on behalf of the Administration) to make sure that an educational institution is covered in its entirety. But he also supports the program specific application outside the area of education.

Two questions immediately arise. First, if he agrees with the Dole bill and seeks to return the law to where virtually everyone else thought it was before Grove City with respect to educational institutions, why did he reverse twenty years of established federal policy in the first place? This is a particularly good question when one considers how well the policy had been working. Mr. Reynolds' ideology should have yielded to the old adage: "If it ain't broke, don't fix it".

Second, if Mr. Reynolds has now seen the light and believes that educational institutions must be covered in their entirety, why won't he support the Restoration Act which applies that basic principle to areas outside the educational context? Why is he content to permit the funding of discrimination, in hospitals, in health services, in housing, and in transportation?

The answers to the questions should be obvious: The Grove City case represents the perfect illustration of Brad Reynolds' approach to civil rights laws. Without exception he interprets them so narrowly that he, in effect, strangles the life out of them, leaving them without any meaning. Mr. Reynolds likes to describe his approach as a "refinement of remedies." In truth, Mr. Reynolds' policies if implemented successfully, would mean the abandonment of all effective remedies.

4. Consent Degrees

Recently, Mr. Reynolds decided to seek the modification of affirmative action consent degrees in 51 jurisdictions. This action is unconscionable and irresponsible. In the words of William Hudnut, the Republican Mayor of Indianapolis, Indiana, the

> "decision to try to turn back the clock on Affirmative Action and Equality of Opportunity is wrong constitutionally, its wrong morally, and it's wrong politically."

According to Howard Friedman, President of the American Jewish Committee, which opposes quotas, action by the Department of Justice

> "will reopen old wounds, and will have the effect of increasing tensions and disrupting social peace in communities across the country."

The mind rebels when trying to understand Mr. Reynolds' decision on the consent degrees. But maybe Francis Guess, the Republican Civil Rights Commissioner appointed by the Senate Majority Leader Howard Baker, explains it best when he criticized the Reagan Civil Rights Commission when it endorsed Reynolds' interpretation of the Stotts decision:

> "I also see nothing in the decision to justify the sweeping and broad interpretation by the Commission majority, which it uses in order to perpetuate its own warped idealogical views on civil rights in this country."

C. Conclusion

In sum, Mr. Reynolds has been the principal architect of a comprehensive assault on our civil rights laws. His rigid right-wing ideology has produced extremist policies that conflict radically with the bipartisan consensus on civil rights in this country. But, most importantly, Mr. Reynolds has repeatedly acted in defiance of the Federal Judiciary and the Congress. The proper question before the Congress is not whether Mr. Reynolds should be promoted. Rather, it is whether he should be allowed to remain in office.

Of all the dangers in the civil rights record of Mr. Reynolds, the danger that looms largest is that it will breed widespread contempt for the law. How are private employees, state and local officials to interpret Mr. Reynolds' systemic refusal to execute faithfully the laws of the United States except as a signal from Washington that civil rights law no longer has to be taken seriously.

When a citizen, an institution or a state or local government violates the Constitution, the damage done to our legal system is unfortunate but remediable. However, if the actions of one of the highest law enforcement official places the powerful Executive Branch in conflict with the Constitution and the courts, the rule of law is imperiled.

The restraints upon unlawful and improper activities by the Executive Branch are fragile indeed. Curbing the excesses reported today requires a Senate prepared to put aside political considerations in order to protect our Constitutional system. The Senate must refuse to confirm W. Bradford Reynolds as Associate Attorney General of the United States.

A number of organizations in the Leadership Conference do not take positions supporting or opposing confirmations of federal officials, and for that reason, do not join us in this statement. The Anti-Defamation League, the U.S. Catholic Conference, the American Jewish Congress, and the American Jewish Committee have specifically requested that they not be listed as concurring in this statement.

Senator MATHIAS. Thank you, Mr. Neas.

Your experience as an expert witness is exhibited by the timing that you took.

STATEMENT OF PHYLLIS McCLURE

Ms. McCLURE. Thank you, Senator Mathias. I will go next.

I am Phyllis McClure of the NAACP Legal Defense and Educational Fund, and I am here to lay out for this committee the record of William Bradford Reynolds in one discreet area of his responsibility. That discreet area has to do with referral of cases from the Department of Education's Office for Civil Rights to the Civil Rights Division of the Department of Justice. Mr. Reynolds is responsible for acting on those referrals.

Senator MATHIAS. When they are received?

Ms. McCLURE. When they are received.

During Mr. Reynolds' tenure, 21 referrals have come to him from the Office for Civil Rights of the Department of Education. One of these was mooted out by settlement. That reduces the number to 20.

In his tenure, he has filed only 3 cases out of 20 referrals. He has referred four back to the Department of Education's Office of Civil Rights with the indication that he would not litigate. I set out the numbers in my prepared testimony. But those numbers alone do not tell the story. I want to focus on three cases which he sent back to the Department of Education where he purported to explain why he did not bring a lawsuit.

Now Mr. Reynolds is on the public record repeatedly announcing that he is opposed to classwide affirmative action relief for women and minorities; that he is in favor of and will vigorously pursue make whole relief for individual, identifiable victims of discrimination.

Senator **Mathias**. He so testified this morning.

Ms. **McClure**. He so testified and I heard him this morning. I am getting sick of hearing it because when you look at this record, there are three individual employment cases. All right.

Identifiable victim No. 1, Dayton, OH. An administrative intern who was denied promotion to be assistant principal in the Dayton public schools.

Identifiable victim No. 2. The director of guidance in Anna-Jonesboro Community High School District, Anna, IL, demoted to be an English teacher. Identifiable individual victim No. 3. A male counselor at Malcolm-King, Harlem College Extension in New York. A male counselor who was terminated from his employment.

The Office for Civil Rights found that in each of these three instances, those individual identifiable victims' rights had been violated. I am a longtime watcher of the Office for Civil Rights, and when they find a law has been violated, it must be an awful airtight case. Having failed to resolve these three cases voluntarily, the Office for Civil Rights sends them over to the Civil Rights Division for litigation. What does Mr. Reynolds do with them? Let me quote you from the Dayton letter; all three letters are virtually identical.

He sends it back to the Department of Education refusing to litigate.

"First, it appears that the complainant is the only person who may have been subject to the title IX violation. There is no evidence to suggest that Dayton is engaged in a continuing pattern of discrimination."

Do you hear what this man is saying, this proposed nominee? Here is this professed champion of civil rights, a man who was quoted in yesterday's Washington Post as saying 90 percent of the time he is on the side of minorities and women, and he is for make whole relief. And yet he refuses to litigate three cases because only one individual has been identified as a victim.

Now, to give him his due, he gave a couple of other reasons. He also said there is no pattern and practice. No, there was no pattern and practice. It was not sent to the Civil Rights Division as a pattern and practice case.

I see my time is out. You can read the rest in my statement.

Thank you.

[Statement follows:]

TESTIMONY OF
PHYLLIS McCLURE
NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC.

Mr. Chairman and members of the Senate Judiciary Committee, thank you for the opportunity to testify at this confirmation hearing on the nomination of William Bradford Reynolds to be Associate Attorney General. I am Phyllis McClure, Deputy Director of the Division of Legal Information and Community Service of the NAACP Legal Defense and Educational Fund, Inc.

I will review for this Committee the record of William Bradford Reynolds as Assistant Attorney General for Civil Rights with respect to matters referred to him by the Office for Civil Rights in the Department of Education.

The Office for Civil Rights (OCR) has primary responsibility for enforcing Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, Section 504 of the Rehabilitation Act of 1973, and the Age Discrimination Act of 1975 for all recipients of federal financial assistance from the Department of Education. These four statutes prohibit respectively discrimination on the basis of race and national origin, sex, handicap and age. When OCR establishes through an investigation that a violation of any of these statutes has occurred, it must first seek voluntary compliance. Voluntary compliance is obtained in over 90% of the cases. When corrective action is not achieved, enforcement of the four statutes must be pursued through an administrative hearing or by "any other means authorized by law."

The Department's implementing regulation at 34 C.F.R. §100.8(a) states:

> Such other means may include . . . a reference to the Department of Justice with a recommendation that appropriate proceedings be brought to enforce any rights of the United States under any law of the United States.

While the Department of Education's ultimate sanction for violation of laws banning discrimination is termination of federal education assistance, the Department of Justice can bring suit in the federal courts to remedy the violation, and vindicate the rights of those suffering the discrimination without disturbing the flow of funds.

The Assistant Attorney General for Civil Rights has a vital coordinating role in the enforcement of these four basic civil rights laws which must ensure that taxpayers' money does not subsidize discrimination.

RECORD OF ADMINISTRATIVE REFERRALS DURING THE TENURE OF MR. REYNOLDS

Twenty-one (21) cases have been referred by the Office for Civil Rights during Mr. Reynolds' tenure at the Department of Justice. Sixteen (16) of these cases were referred two years ago or more. Three were referred 18 to 20 months ago. One was referred in 1985.

This is a box score on the age of and action on referrals.

Time of Referral	Number Referred	No Action	Litigation	Sent Back to ED	Other
1982	3	1	2	0	
June 1983	13	10	0	3	
Sept-Dec 1983	4	2	0	1	1
1985	1		1		
TOTAL	21	13	3	4	1*

*Case mooted by EEOC conciliation agreement.

In only 3 of 20 referrals has Mr. Reynolds initiated litigation. Justice has declined to file suit in four cases and sent them back to OCR. One case was mooted out by an Equal Employment Opportunity Commission conciliation agreement. Twelve (or 60%) of the cases have not been acted upon, most of them over two years old.

This record of inaction lends no support to Mr. Reynolds' oft repeated claim of vigorous enforcement of civil rights by the Department of Justice. Two of the three referrals which did result in litigation--Bakersfield (California) School District and Phoenix Union High School District--were settled in defiance of Supreme Court rulings that school districts have a positive duty to take whatever means are necessary to eliminate unconstitutional segregation within their boundaries.

Both are cases of de jure school segregation reaching back five and six decades. Findings of intentional segregation are based on extensive and comprehensive OCR investigations, and in the case of Bakersfield were upheld by an administrative law judge. Yet Mr. Reynolds entered into consent decrees with both districts which essentially provide for freedom of choice to attend magnet schools, with no backup remedy, and an automatic "sunset" provision. No effective desegregation is sought; no

Constitutional violation is remedied. Both settlements are a sham.

The third referral from OCR was the Alabama Higher Education case in which dismantlement of the state's former de jure system or racially separate, public, four-year colleges is required by Title VI of the 1964 Civil Rights Act. The Civil Rights Division received the referral in December 1981 but did not initiate litigation until July 1983, a year and a half later. The case has not yet come to trial.

Identifiable Victims of Discrimination

Numbers alone do not tell the whole story of Assistant Attorney General Reynolds' treatment of the referrals from the Department of Education.

Mr. Reynolds is on the public record opposed to classwide affirmative relief for women and minorities in cases of employment discrimination but in favor of vigorous enforcement of "make whole relief" for individual, identifiable victims of job discrimination. Mr. Reynolds' position is premised on the belief that the equal employment laws guarantee rights only to individuals and not to groups. Yet in three referrals concerning individual cases of employment discrimination, Mr. Reynolds declined to initiate litigation on the grounds, inter alia, that the complainant appeared to be the only person subjected to discrimination and that there was no evidence of a pattern of discrimination.

1. Dayton Public Schools, Dayton, Ohio: OCR #15-76-0070

On February 9, 1979, OCR issued a Letter of Finding (LOF) citing the Dayton Public Schools in violation of Title IX because it had failed to promote the complainant, an administrative intern, to a position of assistant principal on the basis of her sex. OCR also found that the complainant's demotion to classroom teacher was in retaliation for her having filed a complaint with OCR, a violation of Title IX. Although the LOF states that women held only 27.3% of all high school assistant principalships and that women were promoted to 6 of 23 such vacancies in a six year period, OCR made no finding of discrimination against women as a class. This was strictly an individual case of discrimination.

OCR sought immediate promotion and backpay, but negotiations failed to bring the district into compliance with Title IX. On June 23, 1983 OCR referred the matter to the Civil

Rights Division for litigation. On August 9, 1983 Mr. Reynolds sent the case back to OCR, proferring two reasons why no enforcement action would be taken.

> First, it appears that the complainant . . . is the only person who may have been subject to the Title IX violation found by OCR. There is no evidence to suggest that Dayton is engaged in a continuing pattern of discrimination.
>
> Second, [the complainant]'s OCR complaint is substantially similar to the complaint she filed in federal court under Title VII of the Civil Rights Act of 1964, as amended. That complaint was dismissed with prejudice for failure to prosecute. The decision in [complainant's] private litigation renders this a less than ideal vehicle for Title IX enforcement action by the United States, especially since such action would likely be based only on practices that were or could have been the subject of [complainant's] individual Title VII charge. (cite omitted)
>
> Letter from Assistant Attorney General Reynolds
> to Assistant Secretary for civil Rights
> Harry Singleton, August 9, 1983.

2. Anna-Jonesboro Community High School District No. 81, Anna, Illinois: OCR #05-78-0043

On June 6, 1979 OCR issued an LOF charging the Anna-Jonesboro Community High School district with violating Title IX because it had demoted the complainant, Director of Guidance, to a teaching position in the English Department on the basis of her sex. This too was strictly an individual case. No investigation was conducted of circumstances beyond this one claim of employment discrimination.

OCR sought reinstatement and back-pay for the employee. When negotiations failed to produce a voluntary resolution of the matter, OCR referred the case to the Civil Rights Division for litigation on June 23, 1983. On March 4, 1984 Mr. Reynolds notified OCR that the case was a "poor candidate for a lawsuit by the United States."

> First, it appears that the complainant . . . is the only person who may have been subject to the Title IX violation found by OCR. There is no evidence to suggest that [the district] is engaged in a pattern of discrimination.
>
> Second, . . . [The complainant] filed suit in Federal Court on December 31, 1980. The Court entered an order on April 16, 1982 dismissing the law suit with leave to re-

> open within 60 days upon good cause shown, if settlement was not reached. The suit was not reopened.
>
> Letter from Assistant Attorney General Reynolds to Assistant Secretary for Civil Rights Harry Singleton, March 5, 1984.

3. Malcolm-King: Harlem College Extension, New York, New York: OCR #02-83-2007

A male counselor filed a complaint with OCR alleging that the College had discriminated against him on the basis of sex when it terminated his employment. OCR investigated and found that Title IX had been violated because the complainant's termination resulted from treatment less favorable than that received by similiarly situated women. The LOF was issued on August 22, 1983. Again, this was strictly an individual victim of discrimination.

Having failed over an 11 month period to achieve voluntary compliance, OCR referred the case to Justice on December 8, 1983. Mr. Reynolds responded that he would not bring suit because:

> there is no evidence that a pattern of discrimination exists at the College, and the evidence of discrimination against [complainant] is not strong . . .
>
> Letter from Assistant Attorney General Reynolds to Assistant Secretary for Civil Rights Harry Singleton, February 24, 1984

Here is the Assistant Attorney General for Civil Rights who says he will vigorously pursue "make whole relief" for individual victims of discrimination but who refuses to litigate a case on behalf of an identifiable victim on the grounds, in part, that the individual is the only one who "may" have been discriminated against.

Mr. Reynolds' rejection of litigation is further premised on the absence of a pattern of discrimination. Title IX does not require that a pattern of discrimination exist in order to pursue an individual claim. Even if there were a pattern, Mr. Reynolds would not seek classwide relief because, in his view, the law guarantees equal employment opportunity only to persons who can prove they themselves were victims of unlawful discrimination.

The fact that in two of these cases the complainant also filed a private suit under Title VII does not preclude the Justice Department from enforcement through Title IX. In neither case was the private suit tried on the merits. Like the administrative intern in Dayton and the Director of Guidance in Anna-Jonesboro, people seek redress of employment discrimination from their government. The expense of private litigation is sufficient to deter most people from filing or pursuing their own case. The irony here is that Mr. Reynolds considered the filing of a private suit as an excuse for the Justice Department's refusal to vindicate an individual's rights.

REYNOLDS DECLINES EXPLANATION OF HIS REFUSAL TO SEEK ENFORCEMENT

In addition to the three cases discussed above, Mr. Reynolds has acted on two other referrals but declined to provide any explanation for his refusal to initiate a lawsuit. In both instances the violations of Title VI and Section 504 remain unremedied and hundreds of children continue to suffer.

Dillon County School District #2, Dillon, South Carolina: OCR #04-77-3005

Three times between 1977 and 1982, OCR cited Dillon County School District #2 for maintaining numerous racially identifiable classes as a consequence of its ability grouping practices in violation of Title VI. OCR decided that appropriate relief should be obtained through litigation and referred Dillon #2 to the Justice Department on June 23, 1983. Eleven months later, Mr. Reynolds returned the case to OCR with the terse comment, ". . . we have concluded that no further action by this Department . . . is warranted at this time." Letter from Assistant Attorney General Reynolds to Assistant Secretary for Civil Rights Harry Singleton, May 24, 1984.

Illinois State Board of Education: OCR #05-81-1171

The Illinois State Board of Education is the state agency responsible under federal and state laws for ensuring that handicapped children residing in state-operated facilities are provided appropriate educational programs and the opportunity, to the maximum extent possible, to interact with non-handicapped students. OCR found the Board in violation of Section 504 because it had not ensured that residents at four, state-operated residential facilities were provided education in public school programs, thus affording them interaction with their non-handicapped peers.

OCR referred this case to the Department of Justice on June 23. Mr. Reynolds referred the case, not to OCR, but to the Assistant Secretary for Special Education and Rehabilitative Services. (A copy of this letter of referral was denied under the Freedom of Information Act.) A reasonable inference for Mr. Reynolds action is that he decided that there was no violation of Section 504 (which OCR enforces) but that the policy of the Illinois Board of Education might violate P.L. 94-142, the Education of All Handicapped Childrens Act of 1975, which the Office of Special Education and Rehabilitive Services is responsible for enforcing.

Mr. Reynolds has not explained why he refused to enforce the civil rights laws in the South Carolina or Illinois cases. By referring them back to the Department of Education, he has prolonged and likely rendered any federal enforcement impossible. The Department's sanction of terminating federal funds is a remedy of last resort which by itself would not cure the violation. Litigation by the United States would accomplish the twin goals of vindicating these children's rights and continuing federal funding. For both agencies of the Executive Branch to do nothing is to render both the statutes and the rights they provide null and void.

EDUCATION REFERRALS WHICH HAVE NOT BEEN ACTED UPON BY DEPARTMENT OF JUSTICE

Mr. Reynolds has not acted on over half of the referrals. By far the oldest is Ohio's Higher Education Desegregation Case which OCR referred to the Department of Justice in February 1982. OCR found Ohio in violation of Title VI for failure to disestablish the de jure segregated black college, Central State University. This is an instance in which relief is limited to Central State and does not involve the state system of public higher education. Despite its relative simplicity, Mr. Reynolds has neither initiated litigation or announced a settlement in three and a half years.

The vast majority of referrals still at the Justice Department are Section 504 cases.

1. The University of Alabama in Birmingham: OCR #04-79-2090
Referred June 23, 1983

The University denies interpreter services to all students enrolled in non-degree programs and limits its provision of interpreters to students who are financially unable to hire their own. Such a policy, including the imposition of a means test, violates Section 504.

2. Pittsburgh School District, Pittsburgh, PA: OCR #03-80-1175 Referred October 20, 1983.

This case arose from a complaint filed by parents of a handicapped child on behalf of their son and all other similarly situated children charging that the district denied them free appropriate public education by failing to provide transportation to private school placements during a taxi cab strike. OCR found that the districts' failure to reimburse the parents for the transportation costs they incurred violated Section 504's requirements.

3. Coloma Community School District, Coloma, Michigan: OCR #15-80-1137 Referred June 23, 1983

OCR found the Coloma School District in violation of Section 504 because it did not provide extracurricular activities to certain handicapped students and because it failed to ensure adequate transportation to extracurricular activities provided by another school district. It is a violation of Section 504 to deny handicapped students extracurricular services and nonacademic activities that are necessary to afford them equal educational opportunity.

4. Lawrence School District, Lawrence, Michigan: OCR #15-81-1085 Referred June 23, 1983

The facts of this case are virtually identical to the facts in the Coloma School District case cited above.

5. Clover Park School District, No. 400, Tacoma, Washington: OCR #10-81-1031 Referred June 23, 1983

The Clover Park School District had denied the parents of handicapped children reimbursement for the costs of transporting their children out of the district to their special education placements during a 19-day bus strike. The failure to reimburse imposed costs greater than would have been incurred if the handicapped students had been placed in the district's own facilities. A private lawsuit settled the individual claim of the complainant, but OCR's class complaint could not be resolved voluntarily.

6. Niles Township School District, Illinois: OCR #05-81-1166

7. New Trier School District, Illinois: OCR #05-81-1021

8. Naperville School District, Illinois: OCR #05-80-1076

9. Chicago Board of Education, Illinois: OCR #05-80-1066; #05-80-1124; 05-79-1140

The above four school districts, the Illinois State Board of Education and the Governor's Purchased Care Review Board were found to have violated Section 504 by virtue of their failure to pay the full cost for residential placements which were chosen by the school districts in order to provide fully appropriate educational programs for handicapped children within their jurisdiction. These cases were referred to the Department of Justice on June 23, 1983.

10. Chicago Board of Education, Illinois: OCR #05-82-1109
Referred September 20, 1983

OCR determined that the school district had retaliated against an employee for filing a Section 504 complaint of discrimination.

11. Indiana University/Purdue University at Indianapolis, Indiana: OCR #05-80-2060
Referred June 23, 1983

OCR found the University in violation of Title IX because its student health insurance covers pregnancy-related conditions only if an additional premium is paid and limited coverage at $400.00, whereas other temporary disabilities are covered up to a maximum of $5,000 under the basic policy.

* * *

These 21 cases referred by the Office for Civil Rights of the Department of Education constitute an admittedly small part of Mr. Reynolds record as Assistant Attorney General for Civil Rights. Litigating cases referred by other Executive Branch agencies is, however, a vital function of the Civil Rights Division.

Congress has enacted a panoply of laws designed to protect citizens from discrimination based on race, national origin, sex and disability. The enforcement schemes of the laws proscribing discrimination by recipients of federal financial assistance afford maximum opportunity to remedy noncompliance voluntarily while providing powerful federal sanctions for recalcitrant recipients. The civil rights laws were designed to place the responsibility for ending discrimination on the federal government and not on individual citizens. But laws are not self-executing. They only work if officials charged with their enforcement make them work. Surely Congress did not intend to give the Executive Branch such unfettered discretion amounting to near total inaction.

The students and employees involved are twisting slowly in the wind. The Office for Civil Rights finds their civil rights violated. Their case is sent to Mr. Reynolds for litigation. He refuses to act on most of the cases. A few are returned to OCR which also has not pursued enforcement.

We have the classic case of Catch-22: Mr. Reynolds, the professed champion of civil rights for individual, identifiable victims of discrimination, refuses to file suit in three cases because only one individual has been identified as a victim.

This nominee is the man who would be entrusted with responsibility for all civil litigation, including civil rights litigation, on behalf of the United States. If Mr. Reynolds has not fulfilled his duty with respect to referrals from the Department of Education, can you expect him to rectify this maladministration of justice in the position to which the President has nominated him.

On behalf of the NAACP Legal Defense and Educational Fund, I ask this Committee to require Mr. Reynolds to give account for his inaction on the referrals and to refuse its consent to his nomination as Associate Attorney General.

Senator Mathias. Thank you very much.

You have given us an intriguing preview. [Laughter.]

Ms. McClure. You ought to ask him to explain that.

STATEMENT OF MARTIN E. SLOANE

Mr. Sloane. Mr. Chairman, I am Martin E. Sloane. I am executive vice president of the National Committee Against Discrimination in Housing, which is a 35-year-old fair housing organization. It is the only national fair housing organization in the country.

Senator Mathias. I am familiar with its record.

Mr. Sloane. Pardon me?

Senator Mathias. I am familiar with its record.

Mr. Sloane. We also coordinate a national fair housing network consisting of some 75 private fair housing groups across the country. And I am testifying in opposition to Mr. Reynolds' nomination, not only on behalf of NCDH, but on behalf of the national fair housing network as well.

One of the important programs of NCDH over the years has been fair housing litigation. And in the course of that work we have had occasion to work closely with Justice Department lawyers and appreciate the absolutely critical role of the Department of Justice in fair housing enforcement. It is the only Government agency that has any enforcement authority at all, the authority to institute pattern or practice litigation.

Mr. Chairman, this morning you recounted a conversation you had with Mr. Reynolds preceding his first confirmation where you expressed the conviction that the Assistant Attorney General in charge of the Civil Rights Division had a responsibility to be an advocate of the rights of those protected by the civil rights laws.

There is no area where this is more critical—that is, enthusiastic civil rights advocacy—than in the area of fair housing. All previous Assistant Attorneys General were enthusiastic advocates of fair housing. This was true under Republican and Democratic administrations alike. What I mean by that is that they were firm enforcers of the law, measured by the number of cases they brought, which was very, very substantial, by the importance of the cases they brought, which was very significant. And also measured by their successful efforts in urging of the courts to adopt liberal interpretations of the fair housing law.

Noteworthy is the Justice Department's very important groundwork in persuading the courts uniformly to adopt the effects test as the standard of proof under title VIII. Thus plaintiff's burden of proof is to show that the effect or result is discriminatory, without regard to purpose or motivation.

You also recounted that Mr. Reynolds disagreed with you. He thought his job was limited to the neutral one of merely enforcing the law. Even measured by that more limited standard, he has utterly failed. Let's take the number of cases.

In Mr. Reynolds' first year, 1981, through March 1982, the Justice Department——

Senator Mathias. He did not fully accept my characterization of the conversation.

Mr. Sloane. Well, I believe it. [Laughter.]

Senator **Mathias**. It was my best recollection.

Mr. **Sloane**. Well, he has failed under any recollection.

During Mr. Reynolds' first year in office, through the middle 1982, the Justice Department filed a total of zero cases. Zero is a number that speaks pretty emphatically.

By the next year, after protests from civil rights groups, justice upped the number to two cases. By 1983, justice had six fair housing cases. All of these cases, and there are not very many of them, are also characterized by one common factor. They are of no importance whatsoever. Typical are cases against individual apartment house managers. This is a waste of a very precious resource, Justice Department lawyers, many of whom I know and have worked with. They are very talented. They constitute the best and largest resource for fair housing enforcement in the country, and they have been wasted.

The number of cases has risen over the past year, but their quality remains law. Justice lawyers are still being wasted.

I am sorry my time is up. I would like to say more.

Senator **Mathias**. I am sorry. I apologize for the fact that our time is so limited.

STATEMENT OF ELLIOT M. MINCBERG

Mr. **Mincberg**. Mr. Chairman, my name is Elliot Mincberg, past president of the Washington Council of Lawyers and cochair of the Civil Rights Task Force.

I am here today in place of Mr. Lawrence Schneider, the current president, who is unable to be here today by prearrangement with committee staff yesterday.

We thank the committee for this opportunity to testify.

The council is a voluntary nonpartisan bar association that has sought, since it was created in 1971, to promote public service and public interest activities within the Washington legal community. Its membership includes lawyers from private law firms, civil rights and public interest groups, and governmental agencies, including the Department of Justice and the Civil Rights Division.

Among its other activities, the council has devoted significant effort to scrutinizing the Federal Government's civil rights enforcement activities, focusing specifically on the Civil Rights Division. In September 1982, the council released a report which reflected the results of research by 11 volunteer attorneys concerning that effort. We have attached a copy of that report to our written statement for inclusion in the record of these hearings.

Based on our continuing review of Mr. Reynolds' performance, the council has determined to oppose his nomination as Associate Attorney General. Our 1982 report concluded that under his stewardship, the Division had been forced to retreat significantly from its proud bipartisan tradition of vigorous civil rights enforcement over the past 25 years. That conclusion, unfortunately, is even more true today.

Even more disturbing is the fact that Mr. Reynolds' policies have betrayed a fundamental disregard for legal principles established both by the courts and this Congress, a disingenuous desire to manufacture legal precedents which will impede rather than advance minority rights, and a disruptive effort to reverse years of civil rights progress across the country.

Our written statement talks about five areas: employment discrimination, fair housing, voting rights, rights of the handicapped, and education.

I would focus briefly on the last area. Ms. McClure has already pointed out that only three new school desegregation cases have been brought under this administration, a fraction of the number brought under both previous Republican and Democratic administrations.

Staff attorneys reported to us that investigations in several localities have been virtually abandoned, that appeals in Kansas City, in Texas, and elsewhere, have been dropped.

Mr. Reynolds claims that his only disagreement with civil rights advocates relates to the use of mandatory reassignment, or busing. In that regard, we think it is clear that his interpretation flies in the face of the Supreme Court's command in the *Swann* decisions in 1971.

But even assuming that your focus is only on voluntary remedies, Mr. Reynolds claims that he supports them, but he conveniently neglects to mention that his Department opposed the voluntary inter district plan in St. Louis, switched sides to oppose a plan voluntarily adopted in Seattle, and failed to obtain adequate funding for a voluntary plan which he negotiated in Chicago.

Switching sides in education cases is nothing new to the Justice Department since Mr. Reynolds. The Department reversed its stance in the infamous *Bob Jones* case in order to argue that the IRS could not deny tax exemptions to discriminatory private schools, and abandoned its position in favor of the children of aliens excluded from Texas schools in the Plyler litigation. The Supreme Court rejected the Department on both occasions.

In short, Mr. Reynolds has played a major role in the tragic retreat by the Justice Department from our Nation's bipartisan commitment to vigorous civil rights enforcement. In many respects he has reversed that commitment, transforming the Division from an advocate to an opponent of minority rights. He has ignored court decisions, he has failed to uphold the Constitution and Federal laws, and has disrupted significant civil rights progress across the country.

He should not be promoted or rewarded or elevated to a position where he can have even more influence over the policies of the Justice Department.

The council urges this committee to reject Mr. Reynolds' nomination.

Thank you.

[The following was received for the record:]

STATEMENT OF ELLIOT M. MINCBERG AND LAWRENCE A SCHNEIDER ON BEHALF OF WASHINGTON COUNCIL OF LAWYERS BEFORE SENATE COMMITTEE ON THE JUDICIARY CONCERNING NOMINATION OF WILLIAM BRADFORD REYNOLDS AS ASSOCIATE ATTORNEY GENERAL

My name is Elliot M. Mincberg, past president of the Washington Council of Lawyers and co-chair of its Civil Rights Task Force. I am here with Lawrence A. Schneider, President of the Council for 1984-85. On behalf of the Council, we would like to thank the Committee for this opportunity to testify concerning the nomination of William Bradford Reynolds as Associate Attorney General.

The Washington Council of Lawyers is a voluntary, non-partisan bar association that has sought, since its creation in 1971, to promote public service and public interest activities within the Washington legal community. Its membership includes lawyers from private law firms, civil rights and public interest groups, and governmental agencies, including the Department of Justice. Among its other activities, the Council has devoted significant effort to scrutinizing the civil rights enforcement activities of the federal government, focussing specifically on the Civil Rights Division of the Justice Department, which Mr. Reynolds now directs. In September, 1982, the Council released a widely acclaimed report which reflected the results of research by eleven volunteer attorneys over a period of ten months concerning the Division's activities since 1980. A copy of the report, entitled Reagan Civil Rights: The First Twenty Months, is attached to this statement for inclusion in the record of these hearings.

Based on our continuing review of Mr. Reynolds' performance as director of the Civil Rights Division, the Council has determined to oppose his nomination as Associate Attorney General. Our 1982 report concluded that under his stewardship, the Division had been forced to retreat significantly from its proud bipartisan tradition of vigorous civil rights enforcement over the past 25 years. That conclusion is even more true today. Even more disturbing however, is the fact that Mr. Reynolds' policies have betrayed a fundamental disregard for legal principles established by the courts and this Congress, a disingenuous desire to manufacture legal precedents which will impede rather than advance minority rights, and a disruptive effort to reverse years of civil rights progress in communities across the country. Such a record should lead this Committee to reject Mr. Reynolds' nomination.

Specifically, we wish to focus the Committee's attention on Mr. Reynolds' actions in five areas which support this conclusion: employment discrimination, fair housing, voting rights, rights of the handicapped and the institutionalized, and equal educational opportunity.

Employment Discrimination: Our 1982 report noted that under previous administrations, both Republican and Democratic, the Civil Rights Division has been a leader in aggressively pursuing relief for minorities victimized by job discrimination, and has helped establish the principle of affirmative action relief. Under Mr. Reynolds, this role has been reversed. Mr. Reynolds has refused to accept the Supreme Court's decision in the Weber case upholding voluntary affirmative action programs. Instead, he is actively seeking to reverse or limit that holding and to disrupt such plans across the country.

With respect to affirmative action by court order or consent decree, Mr. Reynolds is continuing to try to persuade the courts, which have rejected his efforts so far, to improperly misinterpret the Supreme Court's Stotts decision as banning all affirmative action relief. In over 50 jurisdictions where the Division itself negotiated consent decrees containing such relief, he has tried to persuade local officials to join the Department in seeking an end to affirmative action, without even giving the persons affected a chance to be heard. To their credit, most of the local officials have refused, pointing to the success of their programs. Undaunted, Mr. Reynolds began a campaign in late April to force them to do so by taking the matter to court. One of his first targets was Indianapolis, where Republican

Mayor William H. Hudnut, III has staunchly resisted Mr. Reynolds' effort and has emphasized the favorable results the city has achieved through its affirmative action program. Mr. Reynolds' disruptive attacks can only succeed in interfering with successful local efforts to redress employment discrimination problems, diverting the scarce resources of the Division and civil rights groups, and demonstrating that his nomination as Associate Attorney General should be rejected.

Fair Housing: Our 1982 report documented that under Mr. Reynolds, the number of fair housing cases brought by the Division was well below even the lowest comparable number under any previous administration. In recent months, we have been pleased to note that the statistical performance of the Division has improved, although it is still below the level achieved under previous Republican administrations. More importantly, however, Mr. Reynolds has shown a blatant disregard for the purposes and implementation techniques of the Fair Housing Act as expressed by Congress and the courts. Mr. Reynolds has proclaimed that the Act was not intended to promote integration, ignoring the clear legislative history of the Act recognized by the Supreme Court in the Trafficante case. Mr. Reynolds has refused to permit Division attorneys to employ the "effects" standard previously established by the Division itself in fair housing cases. Career attorneys report that this has delayed the bringing of new cases and led to the Division's first loss ever in a lawsuit against a municipality.

Voting Rights: Mr. Reynolds was among the leaders in initially opposing the proposed 1982 amendments to the Voting Rights Act, opposition which collapsed only after an outpouring of support for the amendments by members of Congress and their constituents. While most voting rights enforcement is handled by staff attorneys and paralegals, reports from career attorneys and court decisions document highly questionable practices by Mr. Reynolds himself. In Louisiana, for example, Mr. Reynolds rejected his staff's recommendation to protest a redistricting plan as discriminatory, and reportedly supported his decision by disingenuously back-dating the memorandum approving the plan so that earlier legal standards would apply. In Alabama, Mr. Reynolds overruled similar career attorney recommendations, based on a "check" of the evidence which he achieved by calling State officials and simply asking them if they had intended to discriminate! Not surprisingly, they said no. Federal courts later ruled in both cases that the changes were discriminatory, contrary to Mr. Reynolds. These incidents and more are discussed in dotailed memoranda written by career attorneys who have since left the Division, further demonstrating the deterioration of federal civil rights enforcement under Mr. Reynolds.

Rights of the Handicapped and the Institutionalized: Our 1982 report documented the Division's failure under Mr. Reynolds to enforce effectively federal laws seeking to protect handicapped persons and other individuals confined to institutions. A recent Senate staff report on the institutionalized mentally disabled tragically demonstrates that this pattern has continued. For example, in the face of conclusions by his own staff attorneys that conditions at a Maryland mental health facility jeopardized the health and safety of residents, and in fact had resulted in the death of 3 residents, it took Mr. Reynolds nearly three years to negotiate a generalized consent decree, the results of which remain uncertain. A consent decree negotiated with State officials in Alabama has been totally rejected by a federal court. At a Mississippi institution, where Mr. Reynolds reportedly halted a staff investigation of unsafe conditions as a result of a request by an elected Republican official, fire subsequently killed several residents. Former staff attorneys and advocates for the disabled report outright reversals of position and other efforts to side with defendants, not the handicapped, in litigation. As the recent Senate staff report concluded, such actions have distorted the purpose of congressionally mandated intervention by the Division to protect institutionalized persons.

Education: Under Mr. Reynolds, the Division has filed only three new school desegregation cases, a fraction of the number brought under previous Republican and Democratic administrations. Staff attorneys report that substantial investigations in several localities have been virtually abandoned, and that appeals in Texas, Kansas City, and elsewhere have been dropped. Mr. Reynolds has intervened to argue against desegregation plans in Arkansas and Virginia, and proposed measures to weaken desegregation in Louisiana, which he dropped when the local school board did not agree. In Alabama, Mr. Reynolds has opposed a remedial higher education plan approved by the district court and every other party in the case, including the state university system itself. Mr. Reynolds asserts that mandatory reassignment of students must never be used, a position which flies in the face of the Supreme Court's contrary holding in the Swann decisions in 1971. And while Mr. Reynolds often claims that he supports voluntary desegregation measures, he conveniently neglects to mention that the Department opposed a voluntary inter-district plan in St. Louis, switched sides to oppose a plan voluntarily adopted in Seattle, failed to obtain adequate funding for a voluntary plan in Chicago, and agreed to limited voluntary measures in Bakersfield despite their rejection by Department of Education officials within this Administration.

Switching sides in education cases is nothing new for the Justice Department since Mr. Reynolds. The Department reversed its stance in the infamous Bob Jones case in order to argue that the IRS could not deny tax exemptions to discriminatory private schools, and similarly abandoned its position in favor of the children of aliens excluded from Texas schools in the Plyler litigation. Fortunately, the Supreme Court rejected the Department's position in both cases. Mr. Reynolds' failure to pursue effective civil rights enfocement in education, however, has continued.

In short, Mr. Reynolds has played a major role in the tragic retreat by the Justice Department from our nation's bipartisan commitment to vigorous civil rights enforcement. Indeed, in many respects he has reversed that commitment, transforming the Civil Rights Divison from advocate to an opponent of minority rights. In so doing, he has ignored court decisions, failed to uphold the Constitution and federal laws, and disrupted the significant civil rights progress which has been achieved in communities across the country. He should not be rewarded or promoted for this conduct. He should not be elevated to a position where he can have even more influence over the policies of the Justice Department. The Washington Council of Lawyers urges this Committee to reject Mr. Reynolds' nomination as Associate Attorney General.

REAGAN CIVIL RIGHTS:
THE FIRST TWENTY MONTHS

A REPORT BY

THE WASHINGTON COUNCIL OF LAWYERS

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The Council gratefully acknowledges the invaluable secretarial assistance of Ms. Vicki S. Schaffer and the generous support of the law firm Perito, Duerk, Carlson & Pinco, P.C.

The Washington Council of Lawyers is a voluntary, bipartisan bar association that has sought, since its creation in 1971, to promote public service and public interest activities within the legal community. Its membership includes representatives from private law firms, public interest groups and governmental agencies.

PREFACE

This Report reviews the performance of the Justice Department's Civil Rights Division since President Reagan's inauguration. The Division is the Civil Rights backbone of the federal government, and its activities and policies set the pace not only for other federal departments, but also for state, local and private agencies.

Each chapter of the Report reviews at length the activities of the Division's sub-units, which are called "Sections." Each Section has primary reponsibility for the enforcement of particular civil rights laws. The Division's Appellate Section is the only section not individually reviewed but its influence on policies is noted in connection with discussions of particular cases.

The report was prepared over the past ten months by eleven volunteer attorneys of differing backgrounds and experiences. They have done extensive legal research, reviewed public documents, court filings and official Department of Justice statements. They have also interviewed present and past Civil Rights Division attorneys and have met with a variety of knowledgeable people in the civil rights field.

We have made every attempt to keep this Report accurate and current. But, as is often the case when a volunteer group attempts to monitor a governmental agency there may well be errors of omission. For these we apologize in advance.

On behalf of the Washington Council of Lawyers, our sincere thanks to all those people who worked so long and hard to issue this Report.

Robert Plotkin
Chair

Chapter One

SUMMARY

Soon after becoming Attorney General, William French Smith promised minority and women's groups that the Justice Department would continue to enforce vigorously the federal civil rights laws. Although he warned that the Administration would change the focus of past civil rights policies, it would, he said, develop creative new approaches to resolve the problems of discrimination.[1]

Despite these assurances, civil rights advocates remained concerned. To head the Civil Rights Division, the Attorney General selected William Bradford Reynolds, a private practitioner from Washington, D.C. who readily admitted that he had no background or expertise in the field. Subsequent appointments throughout the Department and its Civil Rights Division failed to include anyone with a civil rights background, nor were any members of a racial minority appointed to positions of authority. The public statements made by Administration spokesmen concerning civil rights matters were few and far between, but those that issued contained ominous warnings about the new President's commitment to enforcing federal civil rights law.

This Report was undertaken to evaluate that effort. Twenty months into the Reagan Administration, a review of the Civil Rights Division's activities confirms that the Attorney General's early promise to vigorously enforce the law has not been fulfilled.

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[1] Remarks of Attorney General William French Smith before the American Law Institute at 9-10 (May 22, 1981).

The Civil Rights Division has long been the centerpiece of federal civil rights commitment. It is the barometer by which all federal agencies' activities can be measured. Indeed, the Division is officially charged with coordinating and reviewing all the civil rights policies and regulations of most federal departments. This Report concludes that the Administration has retreated from well-established, bipartisan civil rights policies that were developed during both Democratic and Republican Administrations. At the same time, the Reagan Administration has failed to develop -- and implement -- cohesive and consistent civil rights policies, despite its promise to devise creative and innovative solutions to age-old problems. As a result, the Division's line attorneys have been relegated to the position of a contemporary army entering sophisticated combat with antiquated weaponry and technology.

*Fair Housing Laws Enforcement

New litigation activity under the Reagan Administration has come to a virtual standstill in this area. Compared to an average of 19 new cases per year in 1978-80, and over 32 new cases per year in the Republican years 1969 to 1976, only 2 new cases have been filed since President Reagan took office. The Division has abandoned entirely filing suits against discriminatory zoning ordinances. Its attorneys have not been permitted to urge courts to review the "effects" of housing policy as well as the motivation for it, although the "effects" test is the prevailing law of the land, primarily as a result of the Division's own efforts during previous administrations.

*Equal Educational Opportunity

Assistant Attorney General William Bradford Reynolds has attempted to return the law of school desegregation to the era of "separate but equal," and has virtually denied the continuing existence of segregated schools.

In twenty months not a single desegregation suit has been filed. Equally disturbing, new investigation initiatives have been negligible, a number of pending investigations have been dropped or stalled. Cases that are fully developed and ready to prosecute have not been filed. In pending litigation, the Division has opposed positions it has long advocated, often in the same case. It has refused to seek certain remedies, even after constitutional violations are established, without regard for the individual circumstances of the particular case.

*Voting Rights

The Administration successfully delayed and obfuscated passage of the Voting Rights Act extension for nearly seventeen months. It took nearly a year to adopt a position on the bill and the Administration failed to send a representative to testify during eighteen days of hearings in the House. It finally accepted a routine and common legislative compromise that could have been negotiated months earlier.

The Civil Rights Division's enforcement of the existing voting rights laws shows that only two new affirmative cases have been filed since January, 1981, compared with nearly a dozen filed during the first year of the Carter Administration. In addition, the Division has reversed litigation positions established during previous administrations.

*Rights of Institutionalized and Handicapped Persons

The Justice Department's leadership has publicly denounced judicial involvement in such lawsuits, although the Civil Rights Division has, for more than ten years, actively prosecuted more than a hundred such cases. Assistant Attorney General Reynolds has precluded the use of one of the most successful remedies in these cases, the appointment of special masters to oversee court decrees. The Division has filed but three new cases, has been permitted to initiate only a handful of pre-suit investigations, and has been ordered to limit and revise arguments already made in pending cases. Existing regulations protecting handicapped people have been partially suspended. A soon to be released proposal to revise regulations concerning the rights of handicapped persons indicates that the Administration plans to push for significantly reduced protections.

*Equal Employment Opportunity

The Division has flatly repudiated the well-established requirement that affirmative action may be necessary to remedy certain types of employment discrimination, announcing that under no circumstances would it impose such relief regardless of the particular case. Mr. Reynolds has announced his intention to seek reversal of the Supreme Court decisions establishing the propriety of affirmative action orders. Division attorneys have been ordered to cease making well-established arguments, and cases have been settled upon employers' promises that their "pool of applicants" will include women and minorities, without regard to their actual hiring practices.

"Criminal Civil Rights Prosecutions

Not surprisingly, the Administration's best efforts have come in the prosecution of the federal civil rights laws that provide for criminal penalties (e.g., misconduct by police or correctional officers). Statistics indicate that the number of criminal prosecutions since January 1981 is equal to or greater than the number of cases brought during the Ford and Carter eras in comparable time periods. But, although the level of racially motivated violence appears to be on the increase, the Division's capacity for prosecuting these cases does not show a proportionate increase.

This Report demonstrates that there is a disturbing pattern of limiting and rejecting the civil rights of minorities, women and the handicapped. The Civil Rights Division, long seen as the bastion of civil rights advocacy within the federal bureaucracy, has become, in the Reagan Administration, the naysayer, the too-frequent adversary of minority group interests, the disruptor of continuity. It seemingly has gone out of its way to alienate minority groups by its actions and by its rhetoric, even in circumstances where differences have been minimal or readily resolvable.

The prevailing view of Reagan's top civil rights officials is that America is today a color-blind society that has repudiated its history of bigotry and accepted those citizens who, in the past, were its victims. In those rare instances where discrimination occurs, they believe, the discriminators will voluntarily and in good faith correct their errors, so courts need not ever resort to busing, affirmative action or special masters. However, the historical and current evidence suggests that this is not the case. The unjustified roll-back of bipartisan civil rights policies threatens thirty years of slow but steady progress.

Chapter Two

THE GENERAL LITIGATION SECTION: FAIR HOUSING AND EQUAL EDUCATIONAL OPPORTUNITY

The largest, and perhaps most influential, of the Civil Rights Division's litigating sections is General Litigation. Its 37 lawyers have the major responsibility for litigating discrimination cases in the areas of housing, education and credit. It assumed its present form in 1978, when the former Housing and Credit Section merged with the existing Education Section.

It is this Section that is the public focus of the Reagan Administration's efforts to alter the enforcement of civil rights laws. Aside from the well-documented cases in which the Division has changed sides or withdrawn during the course of the litigation, there are also instances where less visible investigations have been stalled or never initiated. Most importantly, the record reflects that the Division's largest and most prolific Section has initiated no new school desegregation cases and only two minor housing cases during the twenty months of the Reagan Administration. In the remainder of this Chapter, we will discuss more fully the Section's activities in its two principal areas, housing and education.

A. FAIR HOUSING

I. INTRODUCTION: THE CONTINUING PROBLEM OF HOUSING DISCRIMINATION

The Fair Housing Act of 1978 declared it a national policy "to provide, within constitutional limitations, for fair housing throughout the United States."[1] Despite this promise of national commitment, the reality of racial discrimination in housing persists. For example, a 1979 study by the U.S. Department of Housing and Urban Development (HUD) found that the probability of a black homeseeker encountering at least one instance of discrimination in his search for housing is 75% in the rental market and 48% in the sales market.[2]

The prevalent forms of housing discrimination are increasingly less overt and more difficult to uncover. Minorities are subjected to higher sales or rental prices, larger down payments, longer waiting periods, and higher interest rates.[3] They may be subtly induced to search for housing only in minority neighborhoods, a practice known as "steering,"[4] or simply denied access to listings of available housing.[5] Housing opportunities for minorities are further restricted by the discriminatory effects of exclusionary land use controls imposed by local governments, such as zoning for minimum lot size, exclusion of multifamily dwellings, and limitations on the number of bedrooms per housing unit.[6]

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[1] 42 U.S.C. § 3601.

[2] U.S. Department of Housing and Urban Development, Office of Policy Development and Research, Measuring Racial Discrimination in American Housing Markets: The Housing Market Practices Survey ES-2 (1979). A similar HUD study of discrimination against Mexican-Americans in the Dallas rental housing market determined that light-skinned Mexican-Americans were subject to a 65% chance of discrimination while dark-skinned Mexican-Americans had a 96% chance of experiencing discrimination in seeking rental housing. U.S. Department of Housing and Urban Development, Office of Policy Development and Research, Discrimination Against Chicanos in the Dallas Rental Housing Market: An Experimental Extension of the Housing Market Practices Survey (1979). *See also* Lamb, Housing Discrimination and Segregation in America: Problematical Dimensions and the Federal Legal Response, 30 Cath. U. L. Rev. 363, 374-379 (1981) ("Lamb"); Hecht, Apartment Hunting in Black and White, N.Y. Times (May 11, 1978), p. A.23.

This continued racial discrimination in housing has serious consequences. Experts have estimated that housing discrimination is a major cause of the increasingly segregated living patterns which dominate our urban areas today.[7] Largely as a result of discrimination, not simply differences in income, blacks are almost twice as likely as the general population to live in substandard housing, and receive an average of 30% less value for their housing dollar.[8] Segregated and inferior housing for minorities helps produce segregated and inferior education, employment, and municipal services in an increasingly vicious cycle.[9] Despite the promise of fair housing legislation, segregation and discrimination in housing remain unsolved.

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[3] See. H.R. Rep. No. 96-865, 96th Cong., 2d Sess. 5 (1980).

[4] U.S. Commission on Civil Rights, Equal Opportunity in Suburbia 18 (1974).

[5] Id. at 18-19.

[6] See Branfman, Cohen & Trubek, Measuring the Invisible Wall: Land Use Controls and the Residential Patterns of the Poor, 82 Yale L.J. 482 (1973).

[7] See, e.g., Muth, Residential Segregation and Discrimination, in I Patterns of Racial Discrimination 107, 112, 113 (G. von Furstenberg, B. Harrison & A. Horowitz eds. 1974) ("Patterns"); Lamb, supra note 2 at 376-78.

II. FAIR HOUSING LAWS AND THE ROLE OF THE JUSTICE DEPARTMENT

The principal weapon in the fight against housing discrimination, and the primary enforcement tool of the Justice Department, is Title VIII of the 1968 Civil Rights Act, also known as the Fair Housing Act of 1968.[10] The Act prohibits discrimination with respect to a wide range of practices, including not only refusals to sell or rent, but also discrimination in financing, brokerage services, advertising, the terms, conditions, and privileges of sale, and the provision of related services and facilities.[11] Public as well as private discrimination is banned, and Title VIII also bars exclusionary land use controls that discriminate on racial grounds.[12]

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[8] See, e.g., Lamb, supra note 2 at 388-89, Quigley, Racial Discrimination in the Housing Consumption of Black Households, in Patterns, supra, at 121, 122-25, 133.

[9] See, e.g., Lamb, supra note at 2 at 390-95; U.S. Commission on Civil Rights, Equal Opportunity in Suburbia, 9-15 (1974).

[10] 42 U.S.C. § 3601, et seq. Several other laws and constitutional provisions prohibit discrimination related to housing and have been utilized by the Justice Department, such as the Equal Credit Opportunity Act, 15 U.S.C. § 1691, et seq., but most federal fair housing activity has been focused on Title VIII. See U.S. Commission on Civil Rights, The Federal Fair Housing Enforcement Effort 57-60 (1979) ("1979 CRC Report").

[11] 42 U.S.C. §§ 3604-3606.

The Justice Department is the only federal agency empowered to bring enforcement actions under Title VIII.[13] An action for injunctive relief may be brought whenever there is "reasonable cause to believe" that a person is engaged in "a pattern or practice" of discrimination or such discrimination "raises an issue of general public importance."[14] The Department may exercise its authority on the basis of information provided by aggrieved individuals or on the basis of its own independent investigations. Because of its exclusive federal Title VIII enforcement responsibility, the role of the Justice Department is critical to achieving fair housing.

III. CIVIL RIGHTS DIVISION FAIR HOUSING EFFORTS PRIOR TO THE REAGAN ADMINISTRATION

The Civil Rights Division initiated significant efforts in housing discrimination at the time Title VIII was enacted. In 1968, the Division investigated more than 200 allegations of housing discrimination and began developing investigative and litigative techniques for the enforcement of the new statute. In October 1969, the Division established a separate housing section.[15]

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[12] See 42 U.S.C. § 3615; see, e.g., United States v. City of Black Jack, 508 F.2d 1179 (8th Cir. 1974), cert. denied, 422 U.S. 1042 (1975); Morales v. Haines, 486 F.2d 880 (7th Cir. 1973).

[13] HUD has the statutory responsibility to receive and investigate complaints of housing discrimination, but has the power only to conciliate disputes, not to bring enforcement actions. See generally H.R. Rep. No. 96-865, 96th Cong. 2d Sess. (1980); Report of the Comptroller General, Stronger Federal Enforcement Needed to Uphold Fair Housing Laws (1978). Private actions may be brought under Title VIII as well.

[14] 42 U.S.C. § 3613.

In 1977, the housing section became the Housing and Credit Section to reflect the Civil Rights Division's new responsibilities under the Equal Credit Opportunity Act.[16] An Enforcement Unit within the Section was established, devoted exclusively to monitoring compliance with court orders and consent decrees in housing cases.[17] During the Carter Administration, the Housing and Credit Section was merged with the Education Section to form the General Litigation Section, a structure which remains in existence today, in an effort to combat the dual problems caused by discrimination in housing and education.

Under both Republican and Democratic administrations, the Civil Rights Division has played an important role in fighting housing discrimination. Between 1969 and mid-1978, the Civil Rights Division brought more than 300 cases against over 800 defendants, averaging approximately 32 cases per year.[18] In addition, 36 enforcement proceedings

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[15] U.S. Commission on Civil Rights, Federal Civil Rights Enforcement Effort 160 (1971) ("1971 CRC Report").

[16] 1979 CRC Report at 60.

[17] *Id.* at 62.

[18] Fair Housing Amendments Act of 1979: Hearings on H.R. 2540 before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, 96th Cong., 1st Sess. 3 (1979) (statement of Drew S. Days III, Assistant Attorney General, Civil Rights Division, Department of Justice). *See* 1979 CRC Report at 70-71, 73.

(*e.g.*, for civil contempt or supplemental relief) were filed.[19] Even this quantity of litigation has been characterized, by the U.S. Commission on Civil Rights, as "somewhat disappointing" in light of the magnitude of the housing discrimination problem.[20]

However, both the Commission and fair housing advocates have praised the "high quality" of the Division's housing discrimination efforts prior to the Reagan Administration, both in its pre-suit investigations and in its actual litigation.[21] The results speak for themselves. Of the more than 300 cases brought as of mid-1978, the Division had suffered only 2 losses on the merits.[22] Comprehensive relief has been obtained in a number of cases, including the requirement of affirmative steps to correct the effects of past discrimination. Consent decrees frequently have been entered which establish systems of processing housing applicants to ensure against the intrusion of racial and other prohibited considerations.[23] It is important to note that the Division has long had a policy of focusing on complex cases likely to have a great impact on a large number of cases elsewhere in the country. This may account for the Civil Rights Commission's complaint about the Division's relatively small number of cases filed. Yet the return on this investment has been significant.

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[19] Id.

[20] 1979 CRC Report at 71. The Commission cited several factors which limited the litigation effort: the small size of the housing section, the strict internal standards for filing suit, and the section's multi-level internal review process. Id. at 72-73. These factors, coupled with the Division's decision to concentrate on more complex cases with more wide-ranging impact in such areas as exclusionary zoning, resulted in a decrease in the average number of cases filed in the 1978-80 period to 19. See Annual Report of the Attorney General of the United States (1979) at 114; Annual Report of the Attorney General of the United States (1980) at 129.

[21] 1979 CRC Report at 70.

[22] Id. at 57.

[23] Id. at 71.

Perhaps the most notable achievement of the Division has been its contribution to the development of a body of case law which has enhanced the effectiveness of Title VIII. For instance, *United States* v. *City of Black Jack*[24/] was one of the first appellate court decisions to apply to housing cases the "effects" test or "*prima facie*" concept recognized in employment discrimination cases. The court in that case adopted the Justice Department's position that conduct by a defendant (in that case passage of a zoning ordinance prohibiting the construction of any new multiple-family dwellings) which has a discriminatory effect establishes a *prima facie* case of discrimination and shifts the burden of proof to the defendant to justify the ordinance's racially discriminatory impact. Virtually every other federal appellate court has followed *Black Jack* and has held that the *prima facie* case concept is proper under Title VIII.[25/] The "effects" test was utilized by the Division

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24/ 508 F.2d 1179 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975).

25/ *See*, *e.g.*, Robinson v. Twelve Lofts Realty, Inc., 610 F.2d 1032, 1038 (2d Cir. 1979); Resident Advisory Board v. Rizzo, 564 F.2d 126, 146-148 (3d Cir. 1977), *cert. denied*, 435 U.S. 908 (1978); Metropolitan Housing Development Corp. v. Village of Arlington Heights, 558 F.2d 1283, 1287-90 (7th Cir. 1977), *cert. denied*, 434 U.S. 1025 (1978).

itself in United States v. City of Parma[26] as one basis for obtaining a significant court order against the exclusionary actions of an Ohio suburb. The relief included the creation of a fair housing committee within city government and a requirement that the city seek additional subsidized housing for low- and moderate-income families.

Other important principles established in Division housing cases include:

(1) A duty by defendants found liable in discrimination cases to take affirmative steps to correct the effects of their past discrimination;[27]

(2) The right of the United States to sue several defendants operating in the same geographic area as part of a group pattern or practice even where no defendant had individually engaged in a pattern and practice and even though the defendants had not acted in concert;[28]

(3) The vicarious liability of principals for discriminatory acts of their agents;[29] and

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[26] 494 F. Supp. 1049 (N.D. Ohio 1980), aff'd in part, 661 F.2d 562 (6th Cir. 1981).

[27] United States v. West Peachtree Tenth Corp., 437 F.2d 211 (5th Cir. 1971).

[28] United States v. Bob Lawrence Realty Co., 474 F.2d 115 (5th Cir.), cert. denied, 414 U.S. 826 (1973).

[29] United States v. Reddock, P.H.E.O.H. Rptr. ¶ 13,569 (S.D. Ala. 1972), aff'd, 467 F.2d 897 (5th Cir. 1972).

(4) The liability of newspapers for printing discriminatory advertisements.[30]

The Division also has a history of various non-litigation activities promoting fair housing. For example, the Division wrote to more than 17 of the nation's largest title insurance companies advising them to cease insuring property titles that contained racially restrictive covenants.[31] It also has trained employees of federal financial regulatory agencies to uncover evidence of racial discrimination during their examination of regulated institutions, an effort which resulted in dramatic increases in the identification of discrimination-connected irregularities in the savings and loan industry.[32] Division attorneys have also established regular contact with local fair housing agencies and groups to assist in the gathering of information which may lead to enforcement actions. They traditionally have been active in public education by speaking to interested groups throughout the county.[33]

The performance of the Civil Rights Division in the housing discrimination area has been characterized as "impressive."[34] The Division's success in building a legal foundation for successful attacks on housing discrimination has earned it bipartisan praise for making a "significant contribution" to fair housing.[35/]

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[30] United States v. Hunter, 459 F.2d 205 (4th Cir.), cert. denied, 409 U.S. 934 (1972).

[31] 1971 CRC Report at 61.

[32] 1971 CRC Report at 69.

[33] Id. at 64.

[34] Id. at 57.

IV. THE CIVIL RIGHTS DIVISION UNDER THE REAGAN ADMINISTRATION

Both fair housing advocates and career Justice Department attorneys are in agreement that fair housing enforcement by the Civil Rights Division under the Reagan Administration has deteriorated dramatically. This change is most evident in three areas: new litigation activity, shifts in policy, and conduct of previously-filed litigation.

A. New litigation activity

New fair housing litigation activity under the Reagan Administration has come to a virtual standstill. Compared to an annual average of 19 new cases in 1978-80 and over 32 new cases in the predominantly Republican years of 1969-1978, only 2 new fair housing cases have been brought by the Division since 1980. And no cases whatsoever were filed until February, 1982, more than a year after President Reagan took office.[36/]

Moreover, the two cases finally brought by the Section represent a significant departure from its previous strategy to concentrate on complex "test" cases. Both cases involve "distinctly minor suits against individual property management companies,"[37/] which were already

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[35/] *Id.* at 71.

[36/] *Washington Post* (Feb. 13, 1982); *Washington Post* (April 3, 1982) at A15 (letter from Martin E. Sloane, executive director of the National Committee Against Discrimination in Housing) ("Sloane letter").

[37/] Sloane letter.

being sued by local housing groups in virtually identical suits.[38/] Indeed, the Civil Rights Division suits themselves resulted not from investigations by the Division, but from information provided to it by these local groups, shortly before the current Administration took office.[39/] The paucity of new cases and the changed focus of those that do exist furnish strong evidence that the present Administration has retreated from almost fifteen years of vigorous commitment to the goal of fair housing.

The Division has claimed that the amicus curiae brief it filed in the Supreme Court in a housing case, Havens Realty Corp. v. Coleman, 50 U.S.L.W. 4232 (U.S. Feb. 27, 1982), in which the Court affirmed the standing of "testers" to sue under Title VIII, evidences its continued support for fair housing. But the facts behind the filing of the brief belie that claim. In fact, the brief was filed not at the initiative of the Division, but "only at the insistence" of HUD and despite the opposition of the Assistant Attorney General William Bradford

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[38/] Compare Fair Housing Center v. Hartman and Tyner, Inc., No. 8173272 (E.D. Mich., September 8, 1981) with United States v. Hartman and Tyner, Inc., No. 8271066 (E.D. Mich., March 25, 1982); compare also Education/Instruction v. Commonwealth Avenue Associates, C.A. No. 81-208-MA (D. Mass. Jan. 29, 1981) with United States v. Commonwealth Avenue Associates, C.A. No. 82-302-MA (February 4, 1982).

[39/] Sloane letter.

Reynolds.[40] And, although Mr. Reynolds has frequently claimed in public that many new housing cases are "under investigation," present and former Division attorneys have reported that this may mean nothing more than the opening of a new file when a citizen's complaint is received. Again, statistics speak for themselves -- the Division has virtually abandoned new fair housing litigtion since the Reagan Administration took office.

B. Policy Changes

According to present and former Division attorneys, including the former Chief of the General Litigation Section, Robert Reinstein, the decline in new Division litigation activity is due largely to shifts in Division policy. For example, despite previous Division practice and judicial precedent supporting Title VIII as a remedy against exclusionary zoning and similar practices which have significant discriminatory effects, Assistant Attorney General Reynolds has announced that the Division will no longer institute such actions.[41] Fair housing advocates criticize this policy shift as a retreat that is simply unwarranted by applicable case law and one that will insulate discriminatory actions by local governments from legal redress.

Perhaps even more important, the Division has also abandoned the "effects" test, which the Division itself helped to establish. The courts have recognized that Congress' intent in enacting laws against discrimination in employment, housing, and other areas was to combat the "consequences" of discrimination, "not simply the motivation;" as the courts have explained, even discrimination not caused by blatant prejudice "can be as disastrous and unfair to private rights and the public interest as the perversity of a willful scheme." 42/ In addition, both courts and civil rights advocates have emphasized the importance of the "effects" concept in proving discrimination; as the court succinctly observed in the *Black Jack* case, "clever men may easily conceal their motivations" in discrimination cases. 43/ Yet the Division's leaders have apparently forgotten that "sophisticated as well as simple-minded modes of discrimination" are illegal. 44/ Top Division officials have criticized the "effects" test, 45/ and Division attorneys have been told that no new cases employing that concept will be initiated.

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[40] Id.

[41] National Law Journal (Nov. 9, 1981) at 3.

These policy changes are akin to sending a contemporary army into combat with antiquated weaponry and technology. Unable to argue the prevailing law of the land, Section attorneys are simply prohibited

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42/ Griggs v. Duke Power Co., 401 U.S. 424. 432 (1971) (employment); Black Jack, *supra*, 508 F.2d supp. at 1185. *See also* Sisters of Providence v. City of Evanston, 335 F. Supp. 396, 404 (N.D. Ill. 1971); pp. 7-8, *supra*.

43/ *Black Jack*, *supra*, 508 F.2d at 1185.

44/ Lane v. Wilson, 307 U.S. 268, 275 (1939).

45/ *See*, *e.g.*, Memorandum from Robert J. D'Agostino to William Bradford Reynolds (July 21, 1981), reprinted at 127 Cong. Rec. H6183.

from engaging in sophisticated litigation. The leadership of the Division has yet to offer them a viable alternative theory, and the result is stagnation.

C. Conduct of Pending Litigation

These policy shifts have also affected the Division's conduct of pending cases. For example, in a case against the City of Yonkers, challenging segregation in education and housing in New York, the Division has already amended its complaint to eliminate its request that Yonkers remedy affirmatively its previous housing discrimination, despite the fact that the Division itself has helped to establish the principle that such relief may be required. Instead, the amended complaint simply asks that Yonkers do no more than cease its previous efforts to oppose the construction of new or rehabilitated subsidized housing. Yonkers has subsequently rejected a consent decree to this effect, and its watered-down counterproposal is currently being reviewed by Mr. Reynolds. In today's housing market, where little or no such construction is taking place, such "relief" is virtually meaningless.

In addition, Division attorneys report that they have been instructed not to attempt to utilize the "effects" test in any pending litigation, and that references to discriminatory effect are often deleted from briefs and pleadings by the Division superiors. For example, the Division recently told the court in U.S. v. City of Birmingham, No. 80-70991 (E.D. Mich.), that its case was based on discriminatory intent and that it was not employing the "effects" test, despite its recognition that the federal courts of appeal have upheld this approach.[46/]

[46/] National Law Journal (Aug. 9, 1982) at 12. See also New York Times (Dec. 20, 1981) at 4E (discussing the Yonkers litigation).

This shift in position contributed last year to the first defeat the Division has ever sustained in a Title VIII case against a municipality. In October 1981, a federal district court ruled against the Division in a suit filed prior to the Reagan election to end discriminatory housing practices in Manchester, Connecticut. See Angell v. Zinsser, No. 79-229 (D. Conn. Oct. 14, 1981). According to former Section Chief Robert Reinstein, Division attorneys organized their legal and trial tactics around the well recognized "effects" test concept, but were then ordered not to employ that theory by the Reagan appointees who inherited the case.[47/] Not surprisingly, Mr. Reynolds has decided not to appeal the adverse decision in Angell.[48/]

V. CONCLUSION

Until 1981, both Republican and Democratic administrations had joined in the battle against housing discrimination. Under the Reagan Administration, however, the Civil Rights Division has refused to use the very legal doctrines which the Division itself has helped establish, and instead has virtually abandoned the fight. Notably, the

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[47/] This shift was presaged by the D'Agostino memorandum, which criticized the "effects" test and suggested a "complete rethinking of our position in the housing cases including Manchester". 127 Cong. Rec. at H16184. In the Parma litigation, in which the Division had employed the "effects" test at trial, the Division's brief and argument on appeal ignored that aspect of the case. The Sixth Circuit nevertheless affirmed the lower court's opinion in that respect and endorsed the "effects" test.

[48/] National Law Journal (Nov. 9, 1981) at 3, 14.

Administration, which is devoid of previously-recognized expertise in civil rights, has criticized and rejected well-established legal precepts. To date, however, it has proposed no credible alternatives to the theories it has discarded. Whatever its intent, the effect of this policy can only be to exacerbate discrimination in housing across the country.

B. SCHOOL DESEGREGATION AND EQUAL EDUCATIONAL OPPORTUNITY

Historically, the Civil Rights Division's greatest impact has come in its efforts to achieve equal opportunity and desegregation in public education. Since 1964, when Congress first authorized the Attorney General to commence such litigation, the Division has been the single most influential federal agency in matters of desegregation. It has provided the resources and personnel to expand desegregation efforts beyond urban areas in the deep South. It has also forced a succession of Presidents to commit themselves to full equality in education, and it has actively involved the entire executive branch in the desegregation process.

1. SCHOOL DESEGREGATION AND THE CIVIL RIGHTS DIVISION

The Justice Department's battle against segregated schools has been fought on several fronts for nearly thirty years. Prior to 1964, it was on a small scale and was solely reactive.[49] It was only with the passage of the Civil Rights Act of 1964[50] that the Department, through the Civil Rights Division, took on a more active and important role. Among other things, the Act granted authority to the Justice Department to sue in federal courts and to intervene in pending federal suits to enforce desegregation orders.[51] Subject to the general supervision of the Attorney General, the Assistant Attorney General in charge of the Justice Department's Civil Rights Division was responsible for enforcing "all Federal statutes affecting civil rights, including those pertaining to ... school desegregation."[52] In 1966, the Attorney General announced a full-scale attack on desegregation. Forty-four suits were filed in 1966, a substantial increase from just seven in 1965, and ten appeals were filed, as opposed to only one in 1965. Over thirty-five supplementary enforcement motions were filed, and 109 Title VI complaints were received, compared with only eight in 1965.[53]

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[49] Annual Report of the Attorney General ("Annual Report") (1964), at 175.

[50] 42 U.S.C. § 2000, et seq.

[51] Id. §§ 2000c-b, 2000h-2.

Activity had dropped by 1968. While 144 desegregation suits were still pending, only twenty-five new suits were filed. Nonetheless, much effort was expended in enforcing judicial decisions. For example, thirty-six enforcement motions were filed in 1969, sixty-eight in 1970 and thirty-six in 1971.[54] In 1971, the compliance monitoring activity continued, and the Section took up non-black minorities' cases for the first time.

By 1973, during a Republican administration, the Department's reporting format had changed; it no longer provided information on cases filed, but only on those pending. In 1973, there were 230 pending cases, affecting 540 school districts; by 1974 there were 200, affecting about 500 districts.[55] Both reports indicate that compliance monitoring remained important, while new litigation interests included discrimination in Northern schools and language barriers to integrated schools. By 1978 there was still "active litigation" in eight districts, but the concerns about monitoring the Northern discrimination suits and in language barriers cases remained intact.[56]

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[52] 28 C.F.R. § 0.50.

[53] Annual Report (1966), at 196.

[54] Annual Report (1971), at 54-55.

Aside from the sheer volume of new cases and decree monitoring performed by the Civil Rights Division between 1965 and 1980, the quality of the cases contributed to the development of an important body of school desegregation law. The Division helped to establish that school boards must act affirmatively in curing desegregation,[57] and that busing may be a permissible and necessary remedy for desegregation where a school board fails to take adequate remedial steps.[58] In extending the rule of law to the North and West, the Division supported successfully the principle that where plaintiffs can prove that a substantial number of schools in a district are segregated, a court should infer that the district as a whole is segregated unless the school board can prove otherwise.[59]

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[55] Annual Report (1973), at 68-69; Annual Report (1974), at 69-70.

[56] Annual Report (1978), at 136-7.

[57] Green v. County School Board, 391 U.S. 430 (1968).

[58] Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971).

[59] Keyes v. School District No. 1, 413 U.S. 189, 202 (1973); Dayton Board of Education v. Brinkman, 443 U.S. 576 (1979).

It is this volume of activity and body of decisional law, accumulated under both Republican and Democratic administrations, that the Civil Rights Division under the Reagan Administration is seeking to reverse.

II. THE CIVIL RIGHTS DIVISION UNDER THE REAGAN ADMINISTRATION: "ENFORCING" THE LAW OF DESEGREGATION.

A. Reinterpreting School Desegretation Law

At the very heart of the Supreme Court's decision in Brown v. Board of Education, 347 U.S. 483 (1954), is the Court's emphatic pronouncement that "in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal." Id. at 495. Yet perhaps the most alarming example of the Civil Rights Division's changes in policy under the Reagan Administration is its emerging view that "separate but equal" schooling, illegal for a generation, has again become acceptable.

Assistant Attorney General Reynolds has announced that the Division's "future enforcement policies will be aimed" not at eliminating segregation by all permissible means, but at remedying "substantial disparities in the tangible components of education" between minority and white students.[60] In other words, the Division's primary goal is to make minority schools "equal" to white schools even if they remain "separate" -- precisely the concept rejected by the Supreme Court in Brown.

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[60] Testimony of William Bradford Reynolds before House Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary, Hearings on School Desegregation, 97th Cong., 1st Sess. (Nov. 19, 1981) ("Reynolds testimony") at 620, 619. See also Summary of Oral Argument by Solicitor General Lee in Crawford v. Board of Education, 102 S.Ct. 3211 (1982), at 50 U.S.L.W. 3778 (suggesting such measures as increasing teacher-student ratios and spending more funds as alternatives to court-ordered desegregation busing plans).

Moreover, the premise of Mr. Reynolds's shift in policy, the allegation that previous litigation has "rarely" sought to redress educational inequality because of its focus on desegregation,[61] is simply false. Both in major school desegregation cases and in suits challenging state educational finance policies, plaintiffs have aggressively pursued claims of educational inequality and obtained decrees requiring more equal allocation of resources and the provision of additional educational programs to compensate for past discrimination.[62]

On the contrary, it is the present leadership of the Division, not civil rights advocates, which has paid only lip service to the goal of educational equality of minority children. As discussed below, the Division has failed to file a single education-related civil rights case in the first 20 months of the Reagan Administration. It has limited its professed commitment to equal educational opportunity by announcing clearly that it will not "intrude" into educational decision making by school officials and that it will act only where inferior educational services are "deliberately provided" to segregated schools.[63] Indeed, in the only major instance so far in which the Division has been put to the test -- a lawsuit challenging a Texas statute denying regular public education to children of undocumented aliens -- the Division abandoned the position it had taken in the lower courts in support of equal educational opportunity for the alien children. Instead, it told the Supreme Court that the federal government had no view on whether the Texas statute violated the equal protection clause.[64]

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[61] Reynolds testimony at 619.

[62] E.g., Milliken v. Bradley, 433 U.S. 267 (1977); Hobson v. Hansen, 269 F. Supp. 401 (D.D.C. 1967), aff'd, 408 F.2d 1975 (D.C. Cir.), cert. denied, 393 U.S. 801 (1969); Serrano v. Priest, 5 Cal. 3d 584, 487 P.2d 1241 (1971).

The leadership of the Division has also sought to narrowly redefine what constitutes illegal discrimination. According to the current Civil Rights Division, "in every case where de jure segregation is established, we will insist on the removal of all official impediments to desegregation."[65] The key words in that sentence are de jure ("in law") and "removal" of "official impediments." Contemporary school boards seeking to segregate thirty years after Brown will hardly announce their intentions in a public law or pronouncement. Moreover, the Division's policy has little application today in areas where decades of school discrimination have created an entrenched pattern of segregation that "cannot be undone with the stroke of a pen."[66] Instead, as the Supreme Court has emphasized, "affirmative action" is necessary in order to "achieve the greatest possible degree of actual desegregation" practicable where segregation has taken place.[67]

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[63] Reynolds testimony at 619; The Civil Rights Policy of the Department of Justice: A Response to the Leadership Conference on civil Rights (April, 1982) ("Leadership Conference Response") at 19.

[64] Despite the Division's switch in position, the Supreme Court affirmed the lower court's ruling that the Texas statute was unconstitutional. Plyler v. Doe, 50 U.S.L.W. 4650 (U.S. June 15, 1982), aff'g 628 F.2d 448 (5th Cir. 1981).

[65] Leadership Conference Response at 18 (emphasis in the original)

The Division's policy of simply "removing" official obstacles to desegregation might have been meaningful in 1955, when many states still had statutes prohibiting integrated schools. Today it is empty rhetoric. Indeed, the Administration's policy hearkens back to tactics used by Southern obstructionists opposing the original Brown decision. In 1955, defendants in desegregation cases argued that Brown did not require integration (i.e., positive steps to mix the races) but merely forbade the use of government power to promote segregation.[68] These arguments, since discredited, were used to support such plans as shutting down public school systems rather than integrating them.

It seems that by narrowly redefining school segregation the Administration has succeeded in reducing it to a problem of minor proportions. Therefore, it is not surprising to learn that no new school desegregation cases have been filed by this Administration. In its view, school segregation barely exists.

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[66] H.R. Rep. No. 12, 97th Cong., 2d Sess. (1982) ("H.R. Rep. No. 12") at 22.

[67] Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 28, 26 (1971). Accord, e.g., Davis v. School Commissioners of Mobile County, 402 U.S. 33, 37 (1971).

[68] See, e.g., Briggs v. Elliott, 132 F. Supp. 776, 777 (D.S.C. 1955).

B. Failure to Investigate or File New Cases

Since the Reagan Administration took office in January 1981, the Civil Rights Division has not filed a single desegregation suit. Moreover, Justice Department attorneys claim that the enforcement situation is even worse than the lack of court filings would indicate.[69] Investigation initiatives have been negligible; no enforcement priorities have been set; and investigations that were ongoing or nearing completion have received, at best, minimal support.[70] According to present and former Division staff substantial investigations in Phoenix, Rochester, and Albequerque have been virtually abandoned.[71]

69/ Wines, Administration Says It Merely Seeks A "Better Way" To Enforce Civil Rights, [1982] Nat'l J. 536, 539. ("Wines") See also Reynolds testimony, at 624:

> At the moment I guess I have been in office about 3 1/2 months, and .... We certainly do not have any suits, and we do not really have a full-blown investigation. This is the preliminary stage of, one, development, and, two, looking over different school areas to see what would be appropriate, which area it would be appropriate to move forward in.

70/ H.R. Rep. No. 12 at 3, 25.

71/ The Department of Education, the Justice Department's chief "client" in desegregation cases, has had a similarly dismal record of enforcement and investigation during the last year. Notwithstanding a 1977 consent decree requiring the Department to comply with strict timetables for investigations and findings, the annual number of completed investigation per employee dropped from 10.4 in 1980 to only 4.4 in 1981. Moreover, Education Secretary Bell refused to release any findings for a four-month period in early 1981, despite the fact that he had received 86 completed investigations from Department employees. See Wines at 540.

Equally disturbing has been the Department's failure to pursue cases that are fully developed and poised for prosecution.[72] For example, just before leaving office, former Attorney General Civiletti wrote a memorandum to the new Attorney General stating that he was prepared to file suit against more than 20 suburban school districts in the St. Louis area, but that he felt the case needed the support of the new administration.[73] The Division has since failed to take any such action. Indeed, even though the St. Louis School Board itself has sought inter-district desegregation relief against the suburban districts, partly to help mitigate the problems of white flight about which Mr. Reynolds professes concern, the Division has studiously avoided taking a position on the issue in the litigation.

Similarly, the Department of Education referred an Alabama higher education case to the Division in December 1981. Mr. Reynolds has announced that he does not plan to file this suit in the near future, despite Alabama's consistent refusal to make even minimal commitments to equalizing opportunities for black students, faculty, administrators, and staff.[74]

72/ See H.R. Rep. No. 12, at 25.

73/ See Washington Post, June 4, 1981, at A2.

74/ See letter from U.S. Commission on Civil Rights to President Reagan, Feb. 12, 1982. at 7-8.

Furthermore, the Division has refused to appeal cases, despite an arguable likelihood of success, in which the courts have ruled against positions advocated during the previous administrations. In Houston, the Division has abandoned its earlier efforts to seek a metropolitan desegregation remedy, following dismissal of its case at the district court level.[75] In Kansas City, Kansas, a case which the Division has pursued for eight years, the Division has not appealed a district court ruling in which the court declined to impose busing as a remedy. In the South Park district in Texas, the Division abandoned an appeal which had already been filed in a case where the district court had limited desegregation relief to students in grades 4 to 12, despite an earlier appellate court decision that the district court's previous ruling against further desegregation was "clearly erroneous."[76]

The Department's "hands-off" policy is also reflected in its willingness to settle cases with minimal compromise on the part of the school systems.[77] A related symptom is the Division's indifference to violations of existing court orders.

75/ See id at 9; Memorandum & Order, Ross v. Houston Indep. School Dist., Civ. Action No. 10444 (S.D. Tex. June 17, 1981), on remand from (5th Cir.), cert. denied, 364 U.S. 803 (1960); New York Times, Aug. 28, 1981

76/ See United States v. Texas Education Agency, 647 F.2d 504, 508 (5th Cir. 1981), cert. denied, 102 S.Ct. 1002 (1982).

77/ See Wines at 539.

The most notorious example of this is the Chicago case, in which the Department has acquiesced in the school district's defiance of an agreement that it prepare and implement an effective desegregation plan. In the fall of 1980, the Civil Rights Division and the Chicago School Board entered into a consent decree, requiring the school district to file a comprehensive desegregation plan by March 1981, and to implement it the following September. After the school district missed its first deadline, the court ordered it to file a statement of "principles" that would guide its adoption of a desegregation plan. The district's ultimate proposal postponed most compliance until the fall of 1983, and defined a 70% white school as adequately desegregated, although white students comprise only 20% of the entire district. The Division initially rejected the Chicago proposal as "incomplete" and filed written objections to the plan. One month later, however, the Division suddenly reversed its position, withdrew its opposition and requests for additional information and agreed, in effect, to permit the school district to remain in violation of the consent decree. In fact, the Division has actually asked the District Court to refrain from ruling on the adequacy of the school district's proposed guidelines.[78]

The long-run implications of the Department's negligible enforcement efforts are alarming. As the Civil Rights Division refrains from filing any new cases and systematically settles those which are pending, it will soon be left with little or no case load, and a major force in desegregation will have been effectively eliminated. Ultimately, the "non-enforcement" policy amounts to a simple declaration that the problem has disappeared and therefore nothing further needs to be done. In so concluding, the Division is either ignoring reality or completely surrendering to anti-desegregation forces. "[T]he Civil Rights Division now has become a negative force, providing solace to those who have violated and will continue to violate among the most important laws of this nation."[79]

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[78] *See* New York Times (Feb. 14, 1982) at 35; Reynolds Testimony at 620-21, 628.

C. Refusal to Seek Effective Remedies

The leadership of the Division has sought to characterize the dispute between itself and its critics as a simple disagreement over what remedies should be pursued in school desegregation cases, not over basic questions of "enforcement of civil *rights*."[80] As the Supreme Court ruled almost a century ago, however, to eliminate all effective remedies for the enforcement of a right is "to take away the right itself."[81] The record reveals that this is precisely the course on which the Division has embarked in five specific areas. These include: repudiation of mandatory student reassignment plans, reliance upon purely voluntary efforts, refusal to seek system-wide remedies, disavowal of the affirmative duty to desegregate, and refusal to follow court standards for desegregation in higher education.

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[79] H.R. Rep. No. 12 at 25.

[80] Leadership Conference Response at 22 (emphasis in original).

[81] Poindexter v. Greenhow, 114 U.S. 270, 303 (1885).

1. Repudiation of Mandatory Reassignment Plans as a Remedy to Achieve Desegregation

Of primary concern, is the Justice Department's wholesale abandonment of the use of mandatory student reassignment plans and "busing" as a legitimate and effective tool to implement desegregation. Despite the Department's consistent position to the contrary over the last two decades, both Mr. Reynolds and Attorney General Smith have announced unequivocally their repudiation of this remedy under all circumstances. For example, in testimony before the House Subcommittee on Civil and Constitutional Rights, Mr. Reynolds stated:

> [C]ompulsory busing of students in order to achieve racial balance in the public schools is not an acceptable remedy .... The administration is thus clearly and unequivocally on record as opposing the use of mandatory transportation of students to achieve racial balance 82/

The Department's anti-busing policy flies in the face of Supreme Court rulings that "[a]n absolute prohibition against use of [reassignment plans] -- even as a starting point -- contravenes the implicit command of Green v. County School Board ... that all reasonable methods be available to formulate an effective remedy." North Carolina State Board of Education v. Swann, 402 U.S. 43, 46 (1971). Indeed, the Court has recognized for segregated schools in many cases that "it is

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82/ Reynolds testimony, at 614; see H.R. Rep. No. 12, at 21.

unlikely that a truly effective remedy could be devised without continued reliance upon [busing]." Id. (emphasis added).[83] As the Supreme Court cautioned in Swann v. Charlotte-Mecklenberg Board of Education, 402 U.S. 1, 30 (1971), "[d]esegregation plans cannot be limited to the walk-in school." Apparently, the Assistant Attorney General has attempted to do precisely that.

The Division leadership's position also ignores the reality of transportation plans as a remedy to desegregation. The record reveals, contrary to the assertions of Mr. Reynolds,[84] that the lower courts have consistently been reluctant to use such remedies except where necessary as a last resort.[85] The universal pronouncement that busing will not be urged by the Reagan Justice Department, however, is similar to a police department announcing that its officers will never fire their weapons under any circumstances. By removing even the threat of the Division's most effective remedies against intentional law breakers, the Division eliminates much of the incentive for the lawbreakers to undertake voluntary and cooperative efforts and, instead, encourages defiance.

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[83] See also H.R. Rep. No. 12. at 19 (concluding that "busing achieves a degree of desegregation that is unattainable through other means").

[84] E.g., Reynolds testimony at 616. 617.

[85] See Library of Congress, Congressional Research Service, Busing and the Lower Federal Courts, reprinted in School Desegregation Hearings Before the House Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary 97th Cong., 1st Sess. at 655-63. The courts have similarly obeyed the ruling in Swann that desegregation plans must avoid any excessive transportation that could impair the health, safety, or education of students. E.g., Moss v. Stamford Board of Education, 356 F. Supp. 675 (D. Conn. 1973).

The Division has also ignored the historical record in labeling mandatory desegregation and busing as ineffective and "counterproductive."[86] Based on extensive hearings and review of available evidence, the House Subcommittee on Civil and Constitutional Rights recently reached precisely the opposite conclusion. As the Subcommittee reported in March, 1982: 1) "compelling" evidence demonstrates that black students' achievement has improved significantly in desegregated schools and that white students' achievement has either improved or remained the same; 2) desegregation can improve employment opportunities and contribute to desegregated housing patterns; 3) the problem of "white flight" has been exaggerated by the opponents of desegregation and, even where the problem has occurred, significantly more interracial contact has taken place where desegregation has been ordered.[87] In case after case, from Charlotte-Mecklenberg, North Carolina to St. Louis, Missouri to Seattle, Washington, the Subcommittee found that where school officials "made the effort to make desegregation work," it does work.[88] By indicating its own opposition to desegregation through mandatory transportation where necessary, however, the Division's leadership can only encourage the opponents of desegregation and make the prediction of failure a self-fulfilling prophecy.

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[86] Leadership Conference Response at 18.

[87] H.R. Rep. No. 12 at 10, 11-19. The report similarly found that most American school children are bused for nonracial reasons with no detrimental effects, that the costs of busing for desegregation account for about .2% of the cost of public education, and that most opposition to desegregation comes from persons fearing future court orders, not those presently participating. *Id.* at 19.

The Department's opposition to busing has been reflected in three of the Civil Rights Division's major cases and an important legislative initiative during the last year and a half. These instances demonstrate wholesale reversal by the Division leadership of the positions previously advanced by both Republican and Democratic administrations, often in the very cases at issue, and a serious retreat in civil rights enforcement.

a. Seattle, Washington. In Washington v. Seattle School District,[89] for example, the Justice Department had originally joined the Seattle School District in successfully challenging the constitutionality of a statewide initiative that prohibited local school boards from voluntarily adopting or implementing mandatory school desegregation plans. Before the district court and the Ninth Circuit, the Civil Rights Division had argued that the initiative created an impermissible racial classification by allowing school busing for every purpose except desegregation. In addition, the district court found that the initiative was unconstitutionally tainted by the racially discriminatory intent of its sponsors. 473 F. Supp. 966, 1001 (W.D. Wash. 1979). Moreover, both the district court and the Ninth Circuit agreed that Seattle could not effectively eliminate school segregation without the use of busing. Id. at 1001-02, 1007, 1010; 633 F.2d at 1346 n.9.

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[88] Id. at 28. See also id. at 5-11.

[89] Seattle School Dist. v. State of Washington, 473 F. Supp. 996 (W.D. Wash. 1979), aff'd, 633 F.2d 1338 (9th Cir. 1980), aff'd, Washington v. Seattle School Dist., 102 S.Ct. 3187 (1982).

Once the case was appealed to the Supreme Court, however, the United States abruptly switched sides, and filed a brief rejecting all of its prior arguments. The Department asserted instead that the antibusing initiative imposed no particular burden on minority students, and that desegregation policy is a subject appropriate for state, rather than local, control. This pronouncement flies in the face of the Administration's own rhetoric supporting the autonomy of local decision-making authorities.[90]

On June 30, 1982, the Supreme Court rejected the Division's arguments and approved the Seattle plan. Had the Civil Rights Division's position prevailed, a successfully and voluntarily implemented desegregation plan -- presumably exactly the type the Administration professes to seek -- would have been dismantled.

b. Charleston, South Carolina. During the last weeks of the Carter Administration, the Justice Department filed suit against the Charleston County School District in South Carolina, alleging that as the result of a 1967 state law, the district is divided into eight sub-districts, each of which has a separate school board and administrative structure for two purposes only: assignment of students and assignment of staff. Since assignments are not made across sub-district lines, each sub-district is either overwhelmingly white or overwhelmingly black. Moreover, the Department alleged a gross disparity in resource allocation and quality of education as between the white and the black schools.

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[90] See H.R. Rep. No. 12 at 23.

The situation in Charleston is so extreme that even Assistant Attorney General Reynolds has conceded that it must be characterized as an example of de jure segregation. Nevertheless, despite this unusually serious problem, Mr. Reynolds has already specifically renounced any intention of using busing as a remedy.[91] Even in a case such as Charleston, where the constitutional violation is clear, the Civil Rights Division has already committed itself not to go beyond a half-hearted, ineffectual enforcement effort which it has yet to specify.

c. East Baton Rouge, Louisiana: Most recently, the Division has carried its opposition to busing to its inevitable result. Despite Mr. Reynolds' testimony last year that the Division's "present thinking" was to apply its new policy only in future cases,[92] the Division has taken the extraordinary step of urging reconsideration of a desegregation plan already in effect in East Baton Rouge, Louisiana.[93] This despite the fact that the Division itself had previously proposed a remedy in that case requiring more busing than ordered by the district court.[94]

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[91] Reynolds testimony at 614.

[92] Reynolds testimony at 618.

In light of this latest example of switching sides by the Division, the history of the Davis v. East Baton Rouge case is illuminating. The case began in 1956 when black parents sued the school board for unconstitutional school segregation. After more than 20 years of voluntary plans failed to correct the segregation, a federal court of appeals found that significant numbers of single-race schools remained.[95] The district court found in 1980 that the system was in fact still segregated, but again gave the school board the discretion to design its own plan to "effectively dismantle the former dual system."[96]

A year later, after extensive hearings and attempts to resolve the matter with the board's cooperation, Chief Judge Parker was forced to conclude that the conduct of the board presented a classic example of the "litany of failure by local white elected officials to discharge their constitutional responsibilities."[97] The court found that "[n]either in its plan nor in the Court-ordered settlement discussions was a majority of the Board willing to actually desegregate the public schools."[98] Indeed, the Board had refused to accept even a more limited plan proposed by its own Superintendent, which the court indicated it probably would have adopted.[99] For the Civil Rights Division to side with this school district and seek to abrogate a desegregation plan which it had proposed itself is to encourage the very "failure of leadership, courage, and wisdom on the part of local officials" which necessitated federal court involvement in the first place.[100]

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[93] Washington Post (Aug. 10. 1982) at A3.

[94] See Davis v. East Baton Rouge Parish School Board, 514 F. Supp. 869, 873-74 (E.D. La. 1981), modified, 533 F. Supp. 1161 (E.D. La. 1982), app. pending.

[95] Davis, supra, 570 F.2d 1260 (5th Cir. 1978), cert. denied, 439 U.S. 1114 (1979).

[96] Davis, supra, 498 F. Supp. 580 588 (E.D. La. 1980).

d. Proposed Limitations on Federal Court Authority to Order Busing. Not only has the Department consistently refused to support the use of busing as a desegregation tool in any context, but it has also assisted a concerted effort to deprive the federal courts of their discretion to employ busing as a remedial device where appropriate. Attorney General Smith has repeatedly attacked the federal courts for their use of equitable remedies such as busing and injunctions.[101/]

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[97] Davis, supra, 514 F. Supp. 869, 871 (E.D. La. 1981).

[98] Id.

[99] Davis, supra, 533 F. Supp. 1161, 1162 (E.D. La. 1982).

[100] Davis, supra, 514 F. Supp. at 871. The Division's arguments in Davis that "white flight" may justify abrogation of a desegregation remedy has already been rejected by the Supreme Court, in a case brought by the Division itself. See United States v. Scotland Neck Board of education, 407 U.S. 484, 491 (1972). See also H.R. No. 12 at 16-17, 19 (discussing exaggeration of and solutions to white flight problem).

Most recently, on May 6, 1982, the Attorney General endorsed the Johnston-Helms amendment,[102/] the most restrictive anti-busing provision ever passed by either house of Congress. This Senate bill would prevent federal courts from ordering that students be bused more than five miles or fifteen minutes from their homes for desegregation purposes. The Senate bill would also forbid the Justice Department from initiating suits that seek busing as a remedy, and would allow the Department to attempt to undo existing court-ordered busing programs. Smith issued an opinion to the effect that the bill was constitutional, although the constitutionality of such legislation is doubtful at best.[103/] As the East Baton Rouge case suggests, however, the current Division leadership is seeking to implement the bill whether or not it becomes law.

2. Reliance Upon Purely Voluntary Programs

Another persistent theme of the current Civil Rights Division is the notion that any progress toward desegregation may be conducted

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[101/] See New York Times, Oct. 30, 1981, at A22; New York Times, Jan. 25, 1982, at B8; New York Times, Jan. 28, 1982, at A23.

[102/] S. 951 (Department of Justice Appropriation Authorization Bill for FY 1982).

[103/] See North Carolina State Bd. of Educ. v. Swann, supra, 407 U.S. at 46 (ruling unconstitutional North Carolina law forbidding assignment of students on account of race or for the purpose of creating racial balance since it "must inevitably conflict with the duty of school authorities to disestablish dual school systems").

only on a purely voluntary basis. Mr. Reynolds has testified, "I don't think ... that the Government can compel an integrated education .... we are not going to compel children who do not want to choose to have integrated education to have one."[104] This statement captures the essence of the Department's policy, and indicates how far it has moved from the Brown principles.

Such a policy is utterly devoid of support in the law. The Supreme Court has never left any doubt that desegregation is constitutionally mandated.[105] This mandate cannot be satisfied by offering children and their parents the "option" of choosing an integrated education, as Reynolds has proposed.[106] "The burden on a school board today is to come forward with a plan that promises to work realistically now ... [I]f there are reasonably available other ways ... promising speedier and more effective conversion to a unitary, non-racial system, 'freedom of choice' must be held unacceptable." Green v. County School Board, 391 U.S. 430, 439, 441 (1968) (emphasis in original).

Moreover, the Department's eagerness to embrace "voluntary" programs as an acceptable alternative to busing appears either hopelessly naive or subtly disingenuous. A generation of experience with desegregation efforts and experiments has demonstrated fairly conclusively that voluntary or optional transfer programs are simply ineffective in promoting any significant degree of desegregation.[107/] The Supreme Court itself has commented that "the general experience under 'freedom of choice' to date has been such as to indicate its ineffectiveness as a tool of desegregation." Green, supra, 391 U.S. at 440. The Chicago and East Baton Rouge cases, discussed above, are clear illustrations of the Division's readiness to place its faith in voluntary compliance programs despite long histories of failure in those particular districts.

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[104] Reynolds testimony, supra note 60, at 631.

[105] Brown v. Board of Education, 347 U.S. 482 (1954).

[106] Reynolds testimony, supra note 60, at 631-32.

3. Refusal to Seek System-Wide Remedies

Another critical area in which the current Administration has repudiated long-standing Supreme Court precedent and Division practice is the Department's refusal to seek implementation of desegregation programs on a districtwide basis. The Supreme Court in Keyes v. School District No. 1, 413 U.S. 189 (1973), laid down a presumption that if a substantial portion of a particular school district is shown to be impermissibly segregated, a system-wide remedy must be imposed encompassing all schools within that district. In other words, the government need not prove that each individual school is intentionally segregated. The Supreme Court explained:

> common sense dictates the conclusion that racially inspired school board actions have an impact beyond the particular schools that are the subjects of those actions. This is not to say, of course, that there can never be a case in which the geographical structure

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[107/] See H.R. Rep. No. 12. at 19. 21-22.

> of, or the natural boundaries within, a school district may have the effect of dividing the district into separate, identifiable and unrelated units. Such a determination is essentially a question of a fact to be resolved by the trial court in the first instance, but such cases must be rare. In the absence of such a determination, proof of state-imposed segregation in a substantial portion of the district _will suffice_ to support a finding by the trial court of the existence of a dual system.

_Id_. at 203 (emphasis added).

The Assistant Attorney General has announced that he will refuse to abide by the Supreme Court's ruling in _Keyes_. "In deciding to initiate litigation, we will not rely on the _Keyes_ presumption, but will define the violation precisely and seek to limit the remedy only to those schools in which racial imbalance is the product of intentionally segregative acts of State officials."[108] Although Mr. Reynolds has conceded that _Keyes_ creates an automatically-triggered presumption,[109] he has also attempted to argue that _Keyes_ does not really mandate such a presumption, but merely offers the presumption as an option that the Justice Department may choose to exercise if it desires.[110] Ultimately, Mr. Reynolds simply believes that the Supreme Court's holding in _Keyes_ is "unfair,"[111] and therefore he refuses to abide by it.[112]

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[108] Reynolds testimony, _supra_ note 60, at 618.

[109] _Id_. at 617, 622.

[110] _See Id_. at 622.

[111] _Id_. at 618.

[112] This obvious repudiation of the law was also criticized in the Leadership Conference Report, but the Justice Department failed to address this issue in its April 3, 1982 response to the Report.

This shift in policy has more than theoretical importance. By seeking relief in only part of a school system where segregation has occurred, the Division will encourage residential instability and "white flight" as parents seek to transfer their children to schools unaffected by desegregation. In addition, meaningful desegregation may often be impossible if only a fraction of a school district is involved. The Division's new policy, therefore, can only lead to the very unstable and ineffective attempts at desegregation which the Division's own leadership has decried.[113/]

4. Disavowal of the Affirmative Duty by School Boards to Dismantle Dual Systems

It is by now well established that school board officials have an affirmative constitutional obligation to act promptly to "eradicate the effects" of past unlawful segregation. Dayton Board of Education v. Brinkman (II), 443 U.S. 526, 537 (1979). The school district must ensure that student assignment policies do not have the effect of perpetuating or reestablishing a segregated system. Columbus Board of Education v. Penick, 443 U.S. 449, 460 (1979). In discharging this "affirmative duty," school boards must employ "whatever steps might be necessary" to eradicate discrimination, Green v. County School Board, 391 U.S. 430, 437, 440 (1968). "Conscientious efforts"[114/] are not enough;

[113/] See H.R. Rep. No. 12 at 24.

[114/] Department of Justice Response to Leadership Conference Report, at 14.

contrary to the Department's assertions,[115] the Supreme Court has held that compliance will be measured according to the effectiveness of the programs, not simply the degree of good intentions. Dayton Board of Education v. Brinkman, 443 U.S. at 538. School districts guilty of unlawful segregation must take affirmative steps to achieve the "greatest possible degree of actual desegregation" practicable.[116]

Nevertheless, Justice Department officials have disavowed the existence of any such affirmative duty. Assistant Attorney General Reynolds has suggested that school officials have no obligation to provide desegregated schools for all students. His view is that they are merely required to refrain from hindering whatever degree of integration might naturally occur on its own.[117] But this approach impermissibly shifts to parents and children the responsibility for initiating desegregation, a duty which the Supreme Court has held rests "squarely on the School Board." Green v. County School Board, 391 U.S. 430. 441-42 (1968).

Not only has the Department allowed school districts to take an obstructionist, foot-dragging approach to desegregation, but the Department has actually placed obstacles in the way of districts that are making good faith attempts to take some initiative in the desegregation process. In the Seattle case, the Department's policy was extended to its absurd extreme: the Civil Rights Division ultimately took a position litigating against the Seattle School District's affirmative efforts to implement an effective and voluntary desegregation program. Ironically, this stance brings the Department into direct contradiction with the foremost elements of its own enforcement policy--the eradication of state-imposed impediments to desegregation.[118] The Department was defending a state-imposed ban on racial busing, despite the fact that two federal courts had found that desegregation could not effectively be eliminated in Seattle without the use of busing.

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[115] Id. at 12.

[116] Davis, supra, 402 U.S. at 37.

[117] Reynolds testimony at 631-34; see Brief for the United States at 31-36, in Washington v. Seattle School District, supra.

5. Refusal to Follow Court-Ordered Standards for Higher Education Segregation

The Division's refusal to seek effective remedies for past state-imposed segregation is also aptly illustrated by its higher education cases. The Division has taken the position that a large degree of segregation in state higher education systems is tolerable, as long as certain steps are taken to equalize the quality of the schools.[119] While upgrading the quality of traditionaly underfunded schools is certainly important, the problem is that, in the higher education context, "equalization" combined with an open admissions policy often has the effect of perpetuating and reinforcing existing segregation,[120] which is just as illegal as segregation at the pre-college level under Brown. "Where an open admissions policy neither produces the required desegregation nor promises realistically to do so, something further is required." Geier v. University of Tennessee, 597 F.2d 1056, (6th Cir.), cert. denied, 444 U.S. 886 (1979), ordering merger of black and white colleges in Tennessee when freedom of choice plan failed to achieve meaningful desegregation.

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[118] See Reynolds testimony at 618; Response to Leadership Conference Report at 18.

[119] See Leadership Conference Report at 26.

Pursuant to a 1977 court order in Adams v. Califano, 430 F. Supp. 119 (D.D.C. 1977), the Department of Health, Education, and Welfare adopted a number of criteria for determining the acceptability of higher education desegregation plans.[121] These requirements include specific steps to integrate students, faculty, and staff, and to eliminate unnecessary program duplication as between black and white schools (analogous to the magnet school concept). The existence of program duplication leaves students with no incentive to cross traditional racial barriers, and therefore deprives schools of the ability to attract an integrated student body.

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[120] See generally U.S. Commission on Civil Rights, The Black/White Colleges: Dismantling the Dual System of Higher Education (April 1981).

[121] See 43 Fed. Reg. 6658 (1978).

However, the current Civil Rights Division has refused even to abide by the minimal standards required by the court order in *Adams*. In Louisiana and North Carolina, for example, where major efforts had been underway to dismantle dual systems of higher education, the Justice Department and the Department of Education have now reversed their positions and have dropped the pending suits. While the Division's subsequent rejection of Virginia's college desegregation is commendable, there is little evidence that the Department of Education, which initially reviews such plans, is enforcing desegregation regulations and referring cases to the Division. The Department has agreed to require that traditionally black institutions be upgraded, but in the process, has allowed a substantial increase in the degree of program duplication, thus ultimately perpetuating and reinforcing the status quo. Indeed, the United States Commission on Civil Rights and the NAACP Legal Defense Fund have charged that these settlements violate the *Adams* criteria.[122] In response, the Justice Department has argued that the standards are merely flexible guidelines, which the Department may choose not to follow, and that the standards are inapplicable once settlement discussions have begun.[123] But the Department's interpretation completely undermines the purpose of the Adams criteria--to articulate standards so that those affected would have notice of their rights and responsibilities.[124] If the Department may choose selectively whether or not to enforce the standards, states will abandon further compliance efforts as they perceive the increasing likelihood that noncompliance will be tolerated.

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[122] *See* letter from U.S. Commission on Civil Rights to President Reagan, Feb. 12, 1982, at 7; Adams v. Bell, No. 81-1715 (D.C. Cir. 1981); Wash. Post, May 24, 1982, at col. 1.

[123] *See* Brief for the United States, filed in Adams v. Bell, *supra* at 31-36.

Furthermore, the Department's novel "settlement" exemption to the Adams requirements is an unheard of legal position likely to be transported to other areas. In effect, says the Division, a state may circumvent desegregation standards entirely by simply refusing to desegregate until the Division is forced to file suit, and then settling on its own terms. Such a policy signals a further retreat from effective civil rights enforcement.

D. Reinstatement of Tax Exemptions for Discriminatory Private Schools

Finally, the Department has repudiated yet another long-standing legal position by its sudden willingness to extend tax exempt "charitable" status to racially discriminatory private schools. Although the Internal Revenue Service did allow segregated private schools to claim tax deductions prior to 1970, the Supreme Court in 1971 affirmed the issuance of a permanent injunction prohibiting the IRS from continuing such a policy. Green v. Connally, 330 F. Supp. 1150 (D.D.C. 1971), aff'd sub nom. Coit v. Green, 404 U.S. 997 (1971) (per curiam). While the injunction itself applied only to Mississippi, the IRS had already formally extended the non-discrimination policy to all schools, requiring proof that programs and facilities are operated in a non-discriminatory manner before a school may be deemed "charitable" under § 501(c)(3) of the Internal Revenue Code.[125]

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[124] See Adams v Richardson, 480 F.2d 1159, (D.C. Cir. 1973).

The Reagan Administration, however, has jettisoned this legal position in the wake of a challenge by two schools that had been denied tax exemptions by the IRS. See Bob Jones University v. United States, 639 F.2d 147 (4th Cir. 1980), cert. granted, No. 81-3, 102 S.Ct. 386 (Oct. 13, 1981); Goldsboro Christian Schools, Inc. v. United States, 436 F.Supp. 1314 (E.D.N.C. 1977), aff'd mem. 644 F.2d 879 (4th Cir. 1981), cert. granted, No. 81-1, 102 S.Ct. 386 (Oct. 13 1981) (consolidated). After the Fourth Circuit upheld the statutory and constitutional authority behind the IRS rulings, and the Supreme Court had granted certiorari to review the cases, the Justice Department reversed its position and urged the Supreme Court to drop the cases, because the administration had decided to allow the segregated schools to be tax exempt,[126] despite the government's own characterization of the schools as "blatantly discriminatory."[127] For example, though Bob Jones University has admitted black students since 1975, the school prohibits interracial mixing or dating.[128]

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[125] See Bob Jones University v. United States, 639 F.2d 147, 150 (4th Cir. 1980), cert. granted, No. 81-3, 102 S.Ct. 386 (Oct. 13, 1981).

[126] The D.C. Circuit has temporarily enjoined the IRS and the Treasury Department from restoring the tax exemptions. Wright v. Regan, Civ. Action No. 76-1426 (D.C. Cir. Feb. 18, 1982).

[127] See Wash. Post, Jan. 9, 1982, at A1.

The Department's reversal is not only without legal justification, but it also raises "serious constitutional questions," Green v. Connally, 330 F. Supp. at 1164, as it would have the effect of providing substantial economic benefits from the government to large numbers of discriminatory and segregated schools. As a matter of statutory interpretation, the racial policies of the schools in question preclude them from qualifying as "charitable" under the Internal Revenue Code, because they stand in violation of "clearly defined public policy," Bob Jones University v United States, 639 F.2d at 151; see Green v. Connally, 330 F. Supp. at 1156-60. Neither the Free Exercise Clause nor the Establishment Clause of the First Amendment confers on discriminatory schools a right to tax exemptions. The government's compelling interest in eliminating all forms of racial discrimination, whether "governmental or private, absolute or conditional, contractual or associational," outweighs any additional burden on the schools resulting from a denial of tax-exempt status. Bob Jones University v. United States, 639 F.2d at 153. Indeed, the Establishment Clause prohibits government subsidization of racist religious beliefs by means of tax exemptions. See id. at 152 n.7.

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[128] 639 F.2d at 149.

In reversing its position, the Department rejected the statutory basis for the Fourth Circuit holding, and ignored the Supreme Court's decision in the Green case. The about-face was apparently engineered by Mr. Reynolds despite doubts elsewhere within the Administration regarding the propriety and legal basis for his position. Ultimately, the White House was caught in an embarrassing series of inconsistent explanations about the change in policy, further revealing the fundamentally political nature of the decision.[129] Ironically, it appears that tax exemptions to private schools encourages racial segregation in ublic schools and promotes the "white flight" about which Mr. Reynolds rofesses to be so concerned in busing cases.

CONCLUSION

The former federal advocates for civil rights protection have ecome, instead, the naysayers. They now reach out, as in the IRS ituation, to limit and roll-back guarantees thought to be inviolate. eir efforts to dismantle thirty years of achievements in school esegregation, without meaningful alternatives, are the most ominous dication of the Administration's civil rights antipathy.

12/ See generally Wash. Post, Feb. 3, 1982, at A1; Wash. Post, Fe. 2, 1982, at A1.

Chapter Three

THE VOTING SECTION -- VOTING RIGHTS

I. Introduction.

The Voting Section of the Civil Rights Division, originally known as the Voting and Public Accomodations Section, was established in 1969. It has approximately 45 attorneys and paralegals divided between two units, Litigation and "Section 5" submissions.

The Section is responsible for enforcing the Voting Rights Act of 1965, as amended in 1970 and 1975 and as recently amended in 1982.[1] Pursuant to its obligations under Section 5 of the Voting Rights Act, the Voting Section analyzes requests by covered jurisdictions for preclearance of state and local election-related practices or procedures. Where revisions in election practices or procedures could undercut minority voter participation or dilute minority voting strength, the Voting Section recommends that the Attorney General object to such changes. The Voting Section also seeks to enforce the Voting Rights Act by participating as an amicus curiae in private litigation under the Act and by filing vote dilution cases as a party plaintiff.

During the 97th Congress, an extension of the Voting Rights Act was considered and, eventually, enacted into law. In the debate before

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[1] 42 U.S.C. § 1971-1973aa-5.

Congress, the Administration's initial position, as represented by Attorney General Smith and Assistant Attorney General Reynolds, was opposed by every interested civil rights group.

On the enforcement front, the Voting Section has continued to review, and has objected to, several preclearance filings pursuant to Section 5 of the Act. However, Justice Department participation as an *amicus curiae* in private Voting Rights Act litigation has declined, and the Department has changed its position or discontinued participation as an *amicus* in several important cases. No vote dilution cases have been filed.

This chapter will review the controversy concerning the extension of the Voting Rights Act and then will address the Division's enforcement efforts. Despite the Division's claims, it has failed to maintain the bipartisan national commitment to voting rights.

II. The Debate Over the Voting Rights Act Extension.

In enacting the Voting Rights Act of 1965, Congress was fully aware that its previous efforts to ensure the protection and enforcement of the voting rights of minorities had been ineffective, and that "through unremitting and ingenious defiance of the Constitution" several states had deprived blacks of the franchise.[2] Congress recognized that absent determined federal participation, the Fifteenth Amendment's guarantees against discrimination in voting would not be enforced.[3] Accordingly, the Voting Rights Act of 1965 established broad prohibitions against voting discrimination, abolished various tests and qualifications for voting and, most important, created novel and sophisticated mechanisms for enforcement of the Act by the Department of Justice and private parties.[4] The "extraordinary" enforcement mechanisms adopted by Congress, which are temporary and apply only to jurisdictions with a history of discrimination in voting,[5] were necessitated by the covered states' attempts to disingenuously evade the Fifteenth Amendment's prohibition against discrimination in voting.[6]

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[2] South Carolina v. Katzenbach, 383 U.S. 301, 309 (1966).

A. The Civil Rights Acts of 1957, 1960 and 1964.

In the Civil Rights Acts of 1957, 1960 and 1964 Congress for the first time authorized the Attorney General to institute voting rights suits to seek broad injunctive relief.[7] Between 1957 and 1963, the Department of Justice instituted 42 lawsuits under these statutes.[8]

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[3] *Id.* *See also* Christopher, *The Constitutionality of the Voting Rights Act of 1965*, 18 Stanford L. Rev. 1-9 (1965) ("Christopher").

[4] *Infra* at p. 4-8.

[5] 42 U.S.C. § 1973c.

[6] *See*, Christopher, *supra*, at 1-9; Derfner, *Racial Discrimination and the Right to Vote*, 26 Vand. L. Rev. 523 (1973) ("Derfner"); Roman, *Section 5 of the Voting Rights Act: The Formation of the Extraordinary Federal Remedy*, 22 Am. U.L. Rev. 125 (1972).

[7] 71 Stat. 634 (1957), 74 Stat. 86 (1960), 78 Stat. 241 (1964) (codified at 42 U.S.C. §§ 1971, 1971(h), 1974-74e, 1975d, 1975h (1964)). *See* Christopher, *supra*, at 4-7.

[8] Christopher, *supra*, at 6.

Though the enforcement authority granted to the Justice Department was significant, the results were disappointing. The 42 lawsuits resulted in the registration of only 6,000 blacks.[9] In Dallas County, Alabama (which includes the city of Selma) only 383 out of 15,000 blacks were registered in 1964.[10] Between 1958 and 1964 registration of blacks in Alabama increased only from 14.2% to 19.4%; in Louisiana between 1958 to 1964, from 31.7% to 31.8%; in Mississippi from 1954 to 1964, from 4.4% to 6.4%. In each instance, registration of whites was 50 or more percentage points higher than registration of blacks.[11]

Further, case by case litigation proved to be onerous, slow and ultimately ineffective. Attorney General Katzenbach reported that Justice Department lawyers were forced to spend as many as 6,000 hours on each case.[12] In one instance, the government's plea for a temporary injunction was thwarted for eleven months by dilatory motions and the intransigence of a district judge.[13] Even cases that were initially successful proved to be ineffectual because states adopted new, but still discriminatory, practices not prohibited by federal decrees, defied court orders, or closed registration offices to freeze the voting rolls. As the Attorney General testified before Congress in 1965, "Every time the judge issued a decree, the legislature ... passed a law to frustrate that decree."[14] Clearly more effective methods were required.

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[9] Id.

[10] Id. at 8.

[11] South Carolina v. Katzenbach, 383 U.S. at 313.

[12] Christopher, supra, at 8.

[13] See United States v. Lynd, 301 F.2d 818 (5th Cir.), cert. denied, 371 U.S. 893 (1962); Christopher, supra, at 6 n.52.

B. The Voting Rights Act of 1965.

The Voting Rights Act of 1965 has been hailed as one of the most important civil rights bills even enacted by Congress. Like the previous voting rights legislation, the 1965 Act broadly prohibits discrimination in voting and abolishes all discriminatory tests and devices.[15] The difference between the 1965 Act and its predecessors is in its structure and enforcement. The Act incorporates a novel mechanism to enforce the broad prohibitions on voting discrimination: Section 5 requires jurisdictions with a history of voting discrimination to "pre-clear" with the Justice Department all changes in election laws.[16]

The Act includes three major provisions. First, section 2 of the Act prohibits the imposition of any practice or procedure which has the effect of denying or abridging the right of any citizen to vote on account of race, color, or membership in a language minority group.[17]

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[14] Derfner, *supra*, at 576 n.237.

[15] 79 Stat. 437, 42 U.S.C. §§ 1973 *et seq*.

[16] 42 U.S.C. § 1973c. *See* Laughlin, *Voting Rights in the South: Ten Years of Litigation Challenging Continuing Discrimination Against Minorities* (1982) ("Laughlin"), at 16.

[17] 42 U.S.C. § 1973.

Congress specifically abolished the use of any "test or device" in voting.[18] The term "test or device" includes literacy tests, educational requirements, "good character" tests, and, in jurisdictions where a language minority group comprises more than 50% of the voting age population, registration procedures or elections conducted solely in the English language.[19] Jursidictions covered by the minority language provisions are required to provide registration and voting notices, forms, instructions, ballots and other materials in the language of the applicable minority group or, if the language is oral or unwritten as in the case of Alaskan Natives, oral instructions, information and assistance.[20] Bilingual election procedures are required in the states of Alaska, Arizona and Texas and in 215 counties and towns in 27 other states.[21]

Second, in connection with jurisdictions where voting discrimination had been flagrant, Section 5 of the Act establishes temporary, extraordinary remedies without any need for prior adjudication.[22] Jurisdictions are subject to Section 5 coverage if they used literacy tests or devices and less than 50% of the eligible population was registered to vote in either the 1964, 1968 or 1972 elections.[23] The states of Alaska, Alabama, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas and Virginia are covered by Section 5, as are counties or towns in 13 other states.[24] These jurisdictions are prohibited from adopting any change in their election laws without obtaining the prior approval of the Attorney General or the United States District Court for the District of Columbia.[25] Section 5 jurisdictions seeking pre-clearance from the Attorney General or the District Court have the burden of establishing that the proposed changes do not have the purpose or effect of denying or abridging the right to vote because of race, color or membership in a language minority group.[26] Section 5 has been broadly construed to require pre-clearance of *all* proposed changes in election laws, *e.g.*, annexations, redistricting, at-large elections, change in polling places, majority vote requirements, reapportionment, and numbered posts.[27] The statute also provides a "bailout" provision for jurisdictions which for 17 years (or fewer years if the jurisdictions became covered in 1970 or 1975) have not used a test or device in voting with a discriminatory purpose or effect.[28]

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[18] Id. § 1973aa.

[19] Id.

[20] 42 U.S.C. §§ 1973b, 1973aa-1a.

[21] 28 C.F.R. Part 55. See Laughlin, supra n. 16, at 19.

[22] 42 U.S.C. § 1973c. See South Carolina v. Katzenbach, supra.

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[23] *Id.*

[24] 28 C.F.R. Part 51. *See* Laughlin, *supra* n. 16, at 16.

[25] 42 U.S.C. § 1973c.

[26] *Id.*

[27] *See* McCoon, *The Enforcement of the Preclearance Requirement of Section 5 of the Voting Rights Act*, 29 Cath. U. L. Rev. 107, 110-114 (1979).

Third, the Act permits the Attorney General to send federal examiners and observers to certain jurisdictions to protect to the right to vote.[29] Though federal examiners and observers were extensively used during the early years of the Act's enforcement, today they are used less frequently.[30] The Act also abolished durational requirements and established uniform standards for absentee voting in Presidential elections.[31]

Twice before 1982, in 1970 and 1975, Congress examined the progress made under the 1965 Act and extended it. Those extensions brought additional jurisdictions under the Act's special provisions and extended these provisions until August of 1982.[32]

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[28] 42 U.S.C. § 1973b.

[29] 42 U.S.C. §§ 1973d, f.

[30] Laughlin, *supra* at 18.

[31] 42 U.S.C. § 1973aa-1(b).

[32] The 1970 amendments brought within coverage of the Act until August, 1975, counties in New York, Wyoming, California, Alaska and Arizona, and towns in Connecticut, New Hampshire, Maine and Massachusetts. The 1975 amendments extended the Act for seven years, made permanent the nationwide ban of literacy tests and other devices, and extended coverage of the Act to protect language minority citizens from disenfranchisement. Additonal jurisdictions subject to preclearance of election changes affecting language and other minority citizens as a result of the 1975

[Footnote 32 continued on page 65]

Although no one would dispute that substantial gains in minority voting have occurred as a result of the 1965 Act and its amendments, the evidence demonstrates that a wide disparity between minority group registration and white registration still exists.[33] Thus, the Voting Rights Act, facing an August 1982 expiration date, was the first civil rights issue to confront the Reagan Administration when it took office. Its response was less than comforting to civil rights proponents.

C. The 1982 Extension.

During the House Judiciary Committee's consideration of the Act's extension, the Administration refrained from taking any position on

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[Footnote 32 continued from Page 64]

amendments included the States of Alaska, Arizona and Texas, counties in California, Colorado, Florida, North Carolina, South Dakota, and townships in Michigan. Where discrimination in voting against language minority citizens was less severe, Congress required that language assistance be provided in the electoral process. Jurisdictions affected by this requirement included all 143 counties in Texas, all 32 counties in New Mexico, all 14 counties in Arizona, 39 counties in California, 34 in Colorado and 25 in Oklahoma.

33/ Prior to 1965, the percentage of black registered voters in covered states was 29% while white registration was 73%. Today black registration has increased so that in many covered states it stands near 50%; Hispanic registration in Texas has increased by two-thirds. However, white registration continues to outpace minority registration. Further, the number of minority elected officials remains a fraction of the total number of elected officials. For additional statistics, see 97th Cong., 1st Sess., H.R. 97-227 at 7 - 11 (September 1981 Committee Report on the Voting Rights Act Extension) and The Voting Rights Act: Unfulfilled Goals, 1981 Report of the U.S. Commission on Civil Rights.

the legislation. Although Justice Department representatives were invited to testify, no one representing the Administration appeared during any of the Committee's eighteen days of hearing.[34]

On October 5, 1981, the House passed H.R. 3112, by a vote of 389 to 24. H.R. 3112 extended the Voting Rights Act with two major amendments. The first was a change in Section 2 of the Act to clarify that proof of discriminatory purpose or intent is not required in lawsuits brought under that section.[35] The second amendment involved a series of changes to Section 4(a), which permits covered jurisdictions to apply for removal from the Act's provisions.

The amendment to Section 2 was a Congressional response to the Supreme Court's decision in City of Mobile v. Bolden.[36] Prior to

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[34] Chapter 4 of the Leadership Conference on Civil Rights Report, Without Justice (February 1982) states that the Justice Department declined to testify before the Committee because it was prepáring an analysis for the President.

[35] Section 2 of H.R. 3112 provides:

> No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2). The fact that members of a minority group have not been elected in numbers equal to the group's proportion of the population shall not, in and of itself, constitute a violation of this section.

[36] 446 U.S. 55 (1980).

Bolden, a violation of Section 2 could be established by direct or indirect evidence concerning the context, nature and result of the practice at issue. In Bolden, a plurality of the Supreme Court construed Section 2 as simply restating the prohibitions of the Fifteenth Amendment. The Court held that a challenged practice would not be unlawful under Section 2 unless it had been motivated by discriminatory intent. Thus, after Bolden, to be successful a plaintiff would have to prove discriminatory intent, an almost impossible task, rather than demonstrate the discriminatory results or effects that arose from the challenged voting practice. The amendment to Section 2 was intended to clarify the Congressional intent that effects, not motives, were the key factors.[37/] It was this proposal that was seized upon by opponents of the Act.

Throughout the debate before the Judiciary Committee and the House itself, these opponents argued that a "results" or "effects" test, rather than an "intent" test, would for some reason create a right to proportional representation as a remedy, i.e., that a minority must be represented in elective offices in proportion to its numbers in the voting community. Both the language of Section 2 in H.R. 3112 and the House Report address that concern in clear language:

> The proposed amendment does not create a right of proportional representation. Thus, the fact that members of a racial or language minority group have

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[37/] H.R. Rep. 97-227 at 29-30.

> not been elected in numbers equal to the group's proportion of the population does not, in itself, constitute a violation of the section although such proof, along with other objective factors, would be highly relevant. Neither does it create a right to proportional representation as a remedy.[38]

When the Senate began to consider the Voting Rights Act, the Administration finally took a position. Despite the clear language of the House Report, the Administration opposed changes in Section 2 and favored a simple ten-year extension of the Act.[39] In arguing against the House-passed version of Section 2, Attorney General Smith claimed that a "results" or "effects" test would cause years of extended litigation whenever election results, redistricting and reapportionment plans "fail to mirror the population makeup in a particular community ..."[40]

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[38] Id. See n.35, supra, for Section 2 language in H.R. 3112.

[39] The Administration also supported amending the criteria of H.R. 3112 to ease covered jurisdictions' ability to bail out from being covered under the Act. However, as the debate over the Voting Rights Act extension evolved, the administration focused on Section 2, rather than the bailout provisions. This chapter thus has the same focus, although it is important to note that the Administration did seek to weaken the bailout criteria provisions by permitting bailouts based on a showing that a jurisdiction was in full compliance with the Act for a period of less than ten years, the time period for compliance included in H.R. 3117.

[40] Testimony of Attorney General William French Smith, Before the Senate Committee on the Judiciary, January 27, 1982 at 11.

In later testimony before the same Senate Subcommittee, Assistant Attorney General Reynolds went even further in outlining the Administration's views of the consequences that would result if the Senate adopted the House Amendment to Section 2:

> In sum, an effects test under amended Section 2 would likely lend to the widespread restructuring by federal courts of electoral procedures and systems at all levels of government -- from the United States House of Representatives to local school boards -- on no more than a finding that the election system is not designed to avoid disproportionate election results.41/

The Administration also took its campaign to the press. In "Op-Ed" pieces printed in the New York Times and the Washington Post, the Attorney General criticized the House bill as "a hastily devised smoke-screen" for a drastic change in the law that would "compel reorganization of electoral systems to guarantee" proportional representation. 42/

The Administration's position, which it urged on the Senate and the press, was that a simple, ten-year extension of the Act was all that was necessary to continue to implement the goals of the original 1965 Act. The Senate Subcommittee agreed with the Administration, and adopted a simple, ten-year extension of the Act on March 24, 1982.

41/ Testimony of William Bradford Reynolds, Assistant Attorney General for Civil Rights Before the Subcommittee on the Constitution, Senate Committee on the Judiciary, March 1, 1982 at 17.

42/ Washington Post, March 29, 1982, p. A-11; New York Times, March 27, 1982, p. A-23.

At the full Committee, however, the controversy over Section 2 continued. Finally, a bipartisan compromise was fashioned; the purpose of the House amendment would be incorporated into a bill acceptable to a majority of the Senate Judiciary Committee, but specific language would be added to Section 2 itself to clarify that there was not established a right to proportional representation.

On May 4, 1982, the full Judiciary Committee adopted S. 1992, with an amendment offered by Senator Dole containing the Section 2 compromise. The amended Section 2 provides:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2), as provided in subsection (b).
>
> (b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the state or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one "circumstance" which may be considered, provided that nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

The Dole compromise was endorsed by the Administration in a May 4, 1982, letter from the Attorney General to Judiciary Committee Chairman Strom Thurmond. He stated:

> The Department has reviewed and analyzed the compromise language proposed for Section 2 of the Act, and

> we believe that the express provisions of the compromise amendment foreclose the possibility of an interpretation requiring proportional representation. In addition we are pleased that the members of the Senate Judiciary Committee have returned the emphasis of the Voting Rights Act to its proper focus on equal access to the political process and away from an undue emphasis on the results of any particular election. In our view this is far more faithful to the protections accorded all individuals under the Fifteenth Amendment. Accordingly, the Department supports the compromise amendment to Section 2.

Thus, after nearly 17 months of Congressional consideration, the Administration was finally convinced that an amendment to Section 2 would not result in a right to proportionate representation. Despite the clear language of the House-passed version -- which did not include a right to proportionate representation -- the Administration continued to characterize the "liberal [House] version" as "incorporating the highly offensive concept of proportional representation based on race."[43/] The Administration's characterization gave credibility to a false interpretation of the House bill and, until the Dole compromise, threatened to undo the substantial progress that has resulted from the Voting Rights Act.

Here, as in other disputed civil rights issues, the Reagan Administration attempted to mollify its critics on the pretense that it was engaged in a principled legal dispute. All it really accomplished, of course, was to obtain a bill that was, for all intents and

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[43/] Letter to the Editor, Washington Post, from William Bradford Reynolds, May 31, 1982, p. A-16.

purposes, not substantively different than the "liberal" House version. It took them 17 months to achieve a routine and common legislative compromise: making explicit that which was already implicit. Given that no one was advocating "proportionate representation," this delay raises questions about the Administration's own "intent."

But under this guise it sent some very significant messages to several constituencies. The Administration told its supporters that it endorsed passage reluctantly, and then only after months of fighting for "equitable" legislation. It also told minorities that, even in so fundamental an area as voting rights, it would not willingly give them an inch, an approach consistent with its policies in other aspects of civil rights law. Although no administration official would say so publicly, the calculated "effects" of this position were exactly as desired.

III. Enforcement of the Voting Rights Act.

In defense of the Justice Department's enforcement record of the Voting Rights Act, Assistant Attorney General Reynolds has claimed that the Voting Rights Section has "reviewed more than 8,400 electoral changes" and "participated in litigation in 27 court cases seeking to assure minority voting rights" and that "the level of activity in the Division in the past year far exceeds previous years."[44/] Reynolds'

[44/] Speech of Assistant Attorney General Reynolds to the Delaware Bar Association, February 22, 1982, at 6-7.

assertions were repeated in the Justice Department's response to the Leadership Conference Report, with the additional claim that "the level of the Department's activity in reviewing and challenging redistricting plans in 1981 is without precedent."[45/] These claims are clearly impressive and paint a picture of the Justice Department vigorously and effectively protecting the voting rights of minorities.

However, upon closer examination a different picture emerges, primarily because the facts cited by the Civil Rights Division are highly misleading though technically accurate. For instance, only two of the 27 cases in which the Division has "participated" were initiated during this Administration. In addition, in several cases initiated by the previous administration, the Reagan Administration has remained active in the case, but has changed its legal position. Thus, in a case involving the electoral process in Lockhart, Texas which was decided in favor of the United States during the Carter Administration, on appeal to the Supreme Court the present Administration has filed a brief supporting the views of the dissenting judge, and urging that the judgment be vacated.[46/] In other cases the Justice Department's "participation" is as defendant in declaratory judgment actions brought

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[45/] The Civil Rights Policy of the Department of Justice: A Response to the Report of the Leadership Conference on Civil Rights, April 1982, at 40.

[46/] Memorandum for the United States at 7 in the City of Lockhart v. United States, No. 81-802 (prob. jur. noted, March, 1, 1982).

by state or local jurisdictions seeking approval of their plans. In still others it is as an amicus curiae in lawsuits brought by private plaintiffs. Further, the two cases initiated by this Administration were routine Section 5 enforcement actions in Louisville, Mississippi and Sumter County, Alabama. The Department has not yet filed any "major" (e.g. vote dilution) cases.

By contrast, in its first year in office the previous administration filed several Section 5 enforcement actions and defended several other cases. It also initiated lawsuits challenging as unconstitutional the following practices: at-large election systems (Uvalde, Texas), multi-member election systems for school boards (East Baton Rouge Parish, Louisiana), mis-apportionment of aldermanic wards (Kosciusko, Mississippi), and problems in voter registration at predominantly black colleges (Waller County, Texas). In addition, it participated as intervenors or as amici in other cases challenging practices such as: an at-large system for electing selectmen (West Point, Mississippi), at-large elections for the Parish Council (Plaquemines Parish, Louisiana), mis-apportionment of parish districts (Winn Parish, Louisiana), minority language voter registration problems (San Francisco, California), at-large elections under a commission form of government (Shreveport, Louisiana and Mobile, Alabama), and at-large elections for city commissioners (Albany, Georgia). The difference in the level and quality of activity is startling.

Mr. Reynolds' claim that the Justice Department has "reviewed" over 8,400 electoral changes is similarly misleading. The courts have interpreted section 5 to require submission to the Justice Department of changes which alter the election laws "in even a minor way" to give Section 5 the "broadest possible scope."[47] In previous years, changes submitted to the Justice Department ranged from 2.078 in 1975 to 7,472 in 1976 to 7,340 in 1980.[48] Most significant, the 1980 Census has necessitated large scale redistricting and other electoral changes due to population growth and flux. Thus, the figures cited by Mr. Reynolds merely indicate an increase in the numbers of submissions to the Justice Department. "Review" by the Justice Department, though crucial under Section 5, is an obligatory and involuntary act. It reflects no policy decision or activity initiated by the Division.

The claims concerning the number of objections to redistricting plans are more difficult to evaluate. Interestingly, the Division's objections have been to redistricting plans drawn up by Democratic controlled state legislatures in Texas, Virginia, North Carolina, South Carolina, Georgia, Arizona, Alabama and New York City. Thus, although minority groups clearly benefit from the objections, the potential benefit to the Republican Party cannot be ignored. For instance, in connection with the North Carolina congressional redistricting plan, Republican State Senator Cary D. Allred objected successfully to Justice Department approval of the plan, in part on the grounds that the proposed plan "minimizes the influence of the Republican Party in Alamance County because there are no effective Republican Organizations in most of the other counties of the Second District of the ratified plan of 1981."[49/] The Civil Rights Division nevertheless denies charges of "political intervention."

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[47] Allen v. State Board of Elections, 393 U.S. 544 (1969). See generally, McCoon, The Enforcement of the Preclearance Requirement of Section 5 of the Voting Rights Act of 1965, 29 Cath. U.L. Rev. 107, 110-14 (1979).

[48] U.S. Commission on Civil Rights, The Voting Rights Act: Unfulfilled Goals, September 1981, at 183 (Table 6.1).

Perhaps the most striking case of alleged political intervention involves the roles played by Senator Thad Cochran (R-Miss.) and Rep. Trent Lott (R-Miss.) in the Jackson, Mississippi voting case. In 1976 the City of Jackson annexed certain areas surrounding the city and the Civil Rights Division objected, on the grounds that it would dilute black voting strength in Jackson. Initially, the Reagan Administration restated its commitment to enforcing the previous Administration's objection. As late as May, 1981, the Department wrote to the City: "[I]f the 1981 elections are conducted in a manner violative of federal law ... we will be obligated to take prompt action to enforce the provisions of the Voting Rights Act.... [T]he relief we seek may involve an order shortening the terms of the persons elected and requiring that a new election in compliance with federal law be conducted."[50/]

[49/] Letter from Cary A. Allred to the Justice Department, August 5, 1981.

[50/] Letter from James P. Turner, Acting Assistant Attorney General to James Leonard, Counsel to the City of Jackson, dated May 8, 1981.

However, on July 23, 1981, less than 8 weeks later and after intense lobbying by Lott and Cochran, the Department withdrew its objection.[51/] The Leadership Conference Report, citing newspaper articles, charged that the objection was withdrawn as a direct result of political interference by Cochran and Lott. The Department does not deny that Cochran and Lott urged withdrawal, but insists that the objection was withdrawn purely on the merits.[52/]

Whether or not there was improper political intervention, the withdrawal of the objection to the Jackson annexation was based on a curious and unprecedented manipulation of the statistics. The Justice Department explained that the objection was withdrawn in part because the minority population in Jackson increased between 1976 and 1980: "it is possible that some portion of the apparent dilution discerned in 1976 has been cured by unrelated population movement."[53/] The impact of "unrelated population movement," however, has never been previously used to achieve this result. In prior cases involving annexations to Petersburg, Virginia, Richmond, Virginia and Port Arthur, Texas, the Civil Rights Division, although it considered later census data, has

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[51/] Letter from James P. Turner, Acting Assistant Attorney General, to Howard C. Ross, Jr., City Attorney, City of Jackson, dated July 23, 1981.

[52/] The Justice Department's response to the Leadership Conference Report, supra n.45, at 4.

[53/] Letter of July 23, 1981, supra n.51, at 2.

evaluated an annexation by its impact on minority voting strength at the time of the annexation. Under the Jackson approach, through careful annexation a city can restrict black voting strength to its current levels even though black voting population in the "old" city keeps expanding. Whether this approach will be widely used by the Division remains unclear -- perhaps, as the Justice Department states, Jackson is an "atypical" case without any precedential value.

Equally disturbing are those areas in which the Section has not been active. It has filed but two relatively minor cases in 18 months, and it has failed to file a single major case dealing with the pressing problems of "vote dilution." Although there exist notorious examples of covered jurisdictions failing to submit Section 5 preclearance requests, the Division has made no attempt to undertake an affirmative identification or enforcement program, imposing the burden on private parties to enforce voting rights.[54/] And, although it claims to be innundated with preclearance requests, there has been no significant increase in the Section's strength, nor do its budgetary requests reflect much future expansion.[55/]

Thus, as in the other Sections, the day to day business of enforcing the Voting Rights Act seems to go on. But the agenda is filled mostly

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[54/] U.S. Commission on Civil Rights, Federal Civil Rights Enforcement Budget: Fiscal Year 1983 at 35 (June 1982).

[55/] Id.

by old litigation and mandatory Section 5 reviews. There is no new activity and little appears on the horizon. The Section has simply not carried out the bipartisan commitment to vigorous enforcement of voting rights which has characterized its own past activities.

Chapter Four

THE SPECIAL LITIGATION SECTION -- RIGHTS OF INSTITUTIONALIZED AND HANDICAPPED PERSONS

I. Introduction

America's penal, mental health, and juvenile institutions are rife with abuse of their populations.[1] Recognizing the helplessness of inmates to correct institutional misconduct on their own, all the administrations during the past decade have encouraged the Civil Rights Division to address the most flagrant infringements of their Constitutional rights. Congressional hearings from 1978-80 documented continuing pervasive violations, an American horror story that resulted in the passage of the Civil Rights of Institutionalized Persons Act in 1980.[2]

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[1] See, e.g., Friedman, Rights of the Mentally Handicapped: Which Way In the 1980s?", Trial 43, 46 (Feb. 1981); U.S. Comptroller General, Report to the Congress: Women in Prison; Inequitable Treatment Requires Action, (GAO Dec. 10, 1980); U.S. Comptroller General, Report to the Congress: Jail Inmates' Mental Health Care Neglected; State and Federal Attention Needed, (GAO Nov. 17, 1980); U.S. Comptroller General, Report to the Congress: The Department of Justice Can Do More to Help Improve Conditions At State and Local Correctional Facilities, (GAO Sept. 15, 1980); Press, "The Scandalous U.S. Jails," Newsweek pp. 74-77A (August 18, 1980).

[2] See, e.g., Civil Rights of Institutionalized Persons, Hearings on H.R. 10 before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Committee on the Judiciary, 96th Cong., 1st Sess. (Feb. 14, 1979); Civil Rights of Institutionalized Persons, Hearings on S. 1393 before the Subcommittee on the Constitution of the Senate Committee on the Judiciary, 95th Cong., 1st Sess. (June 17-22, 1977); Civil Rights of Institutionalized Persons, Hearings on H.R. 2439 and H.R. the Administration of Justice of the House Committee on the Judiciary, 95th Cong., 1st Sess. (April 29, 1977).

> [T]here is uniform agreement among those familiar with institutional environments that thousands of individuals continue to be subjected to conditions and practices flagrantly violative of their most basic human rights.[3]

It would be whimsical to believe that in the short time since the Act's passage the problems it addressed have dissipated. Indeed, several months after its enactment, the Comptroller General of the United States issued a report finding that "unsafe, unsanitary conditions in many state prisons and local jails endanger the health and well-being of inmates, correctional staff, and visitors"[4] and that "the Department of Justice could offer more assistance."[5] Nevertheless, some eighteen months later, in a speech before the National Conference of Governors, Assistant Attorney General William Bradford Reynolds stated:

> Rarely does one find today the kind of blatant, inhumane brutalization of inmates that stands out like a constitutional red flag to even the most casual observer.[6]

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[3] *Civil Rights of Institutionalized Persons*, *Senate Report to Accompany S. 10*, 96th Cong., 2d Sess. (Nov. 15, 1979), *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 787, 800 (1980.

[4] U.S. Comptroller General, *Report to the Congress: The Department of Justice Can Do More To Help Improve Conditions At State and Local Correctional Facilities*, (GAO Sept. 15, 1980) at i. *See id.* 1-17.

[5] *Id.* ii-iii. *See id.* 23-26. *See also* U.S. Comptroller General, *Report to the Congress: Women In Prison: Inequitable Treatment Requires Action*, (GAO Dec. 10, 1980); U.S. Comptroller General, *Report to the Congress: Jail Inmates' Mental Health Care Neglected; State and Federal Attention Needed*, (GAO Sept. 15, 1980).

[6] Remarks of William Bradford Reynolds before National Governors Conference (Feb. 21, 1982) at 1.

Within weeks of Mr. Reynolds' speech, a federal district court in Indiana issued a preliminary order restraining state prison officials from continuing a practice of shackling celled inmates nude to their beds.[7/] Simultaneously, defendants in Texas[8/] and Alabama[9/] were actively seeking to undo court orders issued for non-compliance with constitutional standards previously imposed.

Mr. Reynolds has criticized the courts in institutional cases as "overly instrusive in ordering relief, mandating detailed requirements to be followed by the states."[10/] Two weeks before the State of Texas renewed its efforts to scale down reforms ordered in the most significant prison litigation in which the Department is now involved,[11/] Mr. Reynolds announced a policy of leaving "many of the details to the states."[12/]

As is also true in the school segregation and employment discrimination areas, Mr. Reynolds has minimized the scope of the problems in

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[7/] French v. Owens. C.A. No. IP75-677-C (March 5. 1982) (Order granting preliminary injunction).

[8/] See "Texas Battle Rages Outside Prisons," Washington Post, p. A4, col. 1 (March 6, 1982), regarding Ruiz v. Estelle, C.A. No. H-78987 (S.D. Tex).

[9/] Newman v. Alabama, App. No. 81-8003 (11th Cir.).

[10/] See, supra n.6 at 4-5.

[11/] See "Texas Battle Rages Outside Prison," Washington Post, p. A4, col. 1 (March 6, 1982).

[12/] Remarks of William Bradford Reynolds before National Governors Conference (Feb. 21, 1982) at 6.

modern institutions. By so doing, it becomes simple to justify reduced levels of activity and attention. Mr. Reynolds' public statements, and the informal policies and bureaucratic controls he has instituted, have chilled the aggressiveness of the Special Litigation Section's staff. The activities of the Section's line attorneys, historically among the Justice Department's most progressive litigators, are now marked by hesitation to press for reforms. The search for effective remedies for constitutional violations has, by administrative fiat, been curtailed.

II. The Statutory Authority of the Special Litigation Section

The Special Litigation Section's authority derives from a hodgepodge of federal statutes. The section has broad jurisdiction to enforce Titles II and III of the Civil Rights Act of 1964, which prohibit discrimination in public facilities and accommodations, Section 504 of the Federal Rehabilitation Act of 1973,[13] the recent Civil Rights of Institutionalized Persons Act,[14] and Titles II through VII of the Civil Rights Act of 1968 (the Indian Civil Rights Act),[15] the Education of

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[13] 29 U.S.C § 794 et seq. In the past, the Section has also enforced federal regulations pertaining to discrimination on the basis of handicap. Since January 1981 the Section has filed only one compliance action, probably because other responsible agencies have failed to refer complaints to it.

[14] 42 U.S.C. § 1997, et seq.

[15] 25 U.S.C. § 1301, et seq.

Handicapped Act[16/] and the Revenue Sharing Act,[17/] where those statutes protect the rights of institutionalized persons. The bulk of the Section's resources have been devoted to rooting out widespread violations of the rights of persons institutionalized in state and local penal, mental health, and juvenile facilities.

The evolution of the Special Litigation Section reflects an increasing expansion of civil rights enforcement authority. This arm of the Civil Rights Division, once confined to routine cases of segregation in public places, is now the country's most significant protector of the rights of the nation's more than one million institutionalized persons. Its history of steady, forward-looking strides in civil rights enforcement and policy under both Republican and Democratic administrations is a model against which the actions of any new administration must be compared.

The Civil Rights Division's focus upon institutional litigation began in 1970, as compliance with the discrimination in public facilities provisions of the 1964 Civil Rights Act became more routine and widespread.[18/] The Division's Public Accommodation Section sought to extend its remedial efforts to new areas of discrimination, and so in 1970 used Title III of the 1964 Act for the first time to challenge racial segregation in state penal institutions.[19/] The following year, the

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[16/] 20 U.S.C. § 1401, *et seq*.

[17/] *See* 31 U.S.C. § 1242.

[18/] *See*, *e.g.*, 1968 Annual Report of the Attorney General, 67.

[19/] United States v. Anderson County, Civ. No. 69-324 (D.S.C. (Consent Order entered March 2, 1970); United States v. Wyandolte County, Civ. No. K.C. 3163 (D. Kan.).

Attorney General formally acknowledged the Division's new focus by creating a separate Office of Institutions and Facilities, charged with "protecting the Civil Rights of persons involuntarily confined to institutions such as jails, prisons, mental hospitals, mental retardation facilities and juvenile detension homes."[20] For the next three years, the office's role in litigation involving both racial discrimination and conditions of confinement in state institutions expanded at a geometric rate.[21]

The separate Office of Special Litigation was first established in 1974. Its formation reflected the Justice Department's ever-increasing recognition of the need to protect the "Constitutional rights of children and mentally [and] physically handicapped persons of all ages."[22] During fiscal year 1975, the new office appeared as amicus curiae or intervened in at least 17 major cases involving mental health and juvenile facilities.[23] In 1977 the Office merged with the Office of Public Accommodations into a single Special Litigation Section in 1977.[24]

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[20] 1972 Annual Report of the Attorney General, 85.

[21] See, e.g., Morales v. Turman, C.A. No. 1948 (E.D. Tex.) (Conditions in Texas juvenile facilities); Newman v. Alabama, C.A. No. 3501-N (M.D. Ala.) (medical care in Alabama prisons); Player v. Alabama, C.A. No. 3835-N (M.D. Ala.) (juvenile referral facilities in Alabama); New York Association for Retarded Children, Inc. v. Rockefeller, C.A. Nos. 72-C-356, 357 (E.D.N.Y.). See also cases described in 1972 Annual Report of the Attorney General, 71.

[22] 1975 Annual Report of the Attorney General, 85

[23] Id.

[24] See, e.g., 1976 Annual Report of the Attorney General, 109; 1977 Annual Report of the Attorney General, 158-62, 165.

The era of activisiam, however, came to an abrupt halt in 1978 when two actions filed by the Special Litigation Section were dismissed on grounds that the United States had no statutory basis to sue.[25] These decisions effectively limited the Section's new activities to participation in cases independently initiated by private parties. Former Assistant Attorney General for Civil Rights, Drew S. Days, III, pressed for passage of the Institutionalized Persons Act, which authorized the Division to bring litigation in its own right. During 1977-1979, Mr. Days appeared before committees of Congress at least five times,[26] and prepared written submissions on numerous other occasions.[27]

25/ United States v Mattson, C.A. No. 74-138 (D. Mont., Sept. 28, 1976), *aff'd*, 600 F.2d 1295 (9th Cir. 1979); United States v. Solomon, 419 F. Supp. 358 (D. Md. 1976), *aff'd*, 563 F.2d 1121 (4th Cir. 1977).

26/ *See*, *e.g.*, *Civil Rights of Institutionalized Persons*, *Hearings on H.R. 10 before* *the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Committee on the Judiciary*, 96th Cong., 1st Sess. 5-33 (Feb. 14, 1979); *Civil Rights of Institutionalized Persons, Hearings on S. 10 before the Subcommittee on the Constitution of the Senate Judiciary Committee*, 96th Cong., 1st Sess. 12-42 (Feb. 9, 1979); *Hearings on Child Abuse in Institutions of the Senate Human Resources Committee*, 96th Cong., 1st Sess. 208-12 (Jan. 24, 1979); *Civil Rights for Institutionalized Persons*, *Hearings on S. 1393 before the Subcommittee on the Constitution of the Senate Committee on the Judiciary*, 95th Cong., 1st Sess. 8-37 (June 17, 1977); *Civil Rights of Institutionalized Persons*, *Hearings on H.R. 2439 and H.R. 5791 before the Subcommittee on Courts, Civil Liberties and the Administration of Justice of the House Committee on the Judiciary*, 95th Cong., 1st Sess. 3-40 (April 23, 1977).

27/ *See*, *e.g.*, Appendix 2 of *Civil Rights for Institutionalized Persons, Hearings on H.R. 2439 and H.R. 5791 before the Subcommittee on Courts, Civil Liberties and the Administration of Justice of the House Committee on the Judiciary*, 95th Cong., 1st Sess. 288-325 (April 29, 1977).

The legislation took several years to pass, and the Section's ability to generate new activities remained limited. During 1978, the Section nevertheless became involved in sixteen new cases, intervening as a party in two institutional cases and appearing as *amicus* in seven more.[28] In 1979, however, only four new complaints were filed. The Section intervened in 2 existing cases and joined as *amicus* in five others.[29] In 1980. no new cases were filed; participation in new litigation was limited to joining as *amicus* nine times.[30]

In May, 1960, the Civil Rights of Institutionalized Persons Act was finally passed, giving the Justice Department specific authority to take action in this area. In the waning days of the Carter Administration, the Section promptly began implementing its procedures by issuing three notices of intent to investigate conditions of confinement in correctional institutions,[31] and another regarding the adequacy of treatment provided in juvenile facilities in the Commonwealth of Puerto Rico.[32] It was against this background that the policies of the Reagan Administration took effect.

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[28] *1978 Annual Report of the Attorney General*, 140. The seven new complaints filed by the Section in 1976 all were brought under the rubric of Title II. *Id*. In a controversial decision, primary authority for litigating future cases under Title II was transfered to individual United States Attorneys. *Id*.

[29] *1979 Annual Report of the Attorney General*, 115.

[30] *1980 Annual Report of the Attorney General*, 131.

[31] *Id.*

[32] Santana v Collazo, C.A. No. 75-1187 (D.P.R.)

III. The Special Litigation Section Under the Reagan Administration

Despite Mr. Reynolds' expressed desire to scale down institutional litigation, he continues to protest publicly that "the commitment of this Administration to strong and vigorous enforcement of the many federal statutes," including the Institutionalized Persons Act, "is not ... empty rhetoric."[33] However, the Reagan Administration's actions to enforce the Act thus far do not support Mr. Reynolds' statements.

The Special Litigation Section does continue to pursue most cases filed during previous Administrations. At the same time, however, the Section has not aggressively pursued new cases; tactics in pending cases have been amended and some legal positions altered; the Section's clear emphasis has been on conciliation with state defendants; and, in at least two instances, the Department has laid the groundwork to oppose relief that it has supported in the past.

A. Freezing Civil Rights Enforcement

Mr. Reynolds has proudly reported that his Administration has "initiated 16 investigations of allegedly egregious conditions" in correctional, nursing home, and mental health facilities.[34] More relevant, however, is the fact that the Justice Department's March 10,

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[33] Remarks of William Bradford Reynolds before the Delaware Bar Association (Feb. 22, 1982) at 8.

[34] Id.

1982, motion to intervene in a sex-discrimination case against a Kentucky prison was the very first new enforcement action filed by the Section in fifteen months under the Reagan Administration.[35]

The Section later intervened in a private suit, *Davis* v. *Henderson*, involving a Louisiana hospital for mentally ill offenders. The local U.S. Attorney, Stanley Bardwell, reportedly opposed the intervention, allegedly "lost" the signed copy of the legal papers he had been instructed to file, and then refused to sign the replacement copies. To Mr. Reynolds' credit, the suit was filed despite his opposition.

However, Mr. Reynolds and Attorney General Smith have rejected numerous other staff recommendations to initiate investigations, file suit or intervene. According to present and former Section staffers, Mr. Reynolds rejected staff recommendations to participate in litigation involving North Carolina facilities. In another case regarding a Virginia mental hospital, he declined to intervene on the basis that the state was conducting its own investigation. He refused to sue the Yuma, Arizona County Jail on the grounds that its conditions were "too bad."

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[35] Canterino v. George Wilson, C.A. No. C80-0545-L(J) (W.D. Ky.). Since March 10, 1982, one additional complaint has been filed, USA v. Baylor University Medical Center, C.A. No. 3-82-0453D. However, it is an extremely limited action against Baylor University to enforce regulations of the Department of Health and Human Services, and involves no substantial issues.

Additionally, Mr. Reynolds' figures appear misleading. When questioned, attorneys within the Section could not substantiate the claim that 16 investigations had been launched. They surmised that the statistic includes all investigations initiated since the enactment of the new statute in early 1980, which encompasses several begun prior to Mr. Reynold's arrival.

Early in his term, Mr. Reynolds circulated a memorandum to the staff that all decisions reflecting litigation tactics or policy, however small, must be approved by the Section's supervisory staff:

> ...[W]hile I am in the process of reformulating current division policy in certain areas, and until further notice, I am directing that all substantive pleadings and memoranda be provided to the Deputies for review at least 24 hours prior to the filing date.[36]

Although the purpose of this directive purported to be to enable Mr.Reynolds to "familiarize himself" with the operation of the Section as he commenced his new duties,[37] the directive continues in effect today. As a result, Mr. Reynolds and his immediate subordinates review most pleadings, spending much of their working days editing and directing technical staff decisions. On May 27, 1981, Attorney General Smith further tightened controls over the independence of line attorneys to litigate prison cases by ordering that:

> [t]he Civil Rights Division is directed to obtain the recommendation of the Bureau of Prisons in

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[36] Memorandum from Reynolds to All Employees (August 19, 1981), at 2.

[37] Id.

> connection with all important pleadings in sufficient time to ensure their meaningful participation ... This directive ... applies to all pending cases as well as those not yet filed.38/

Less formal restrictions from above are also evident. Until the summer of 1982, the Administration neglected to finalize the appointments of the Section's immediate supervisors (the "Acting Section Chief" and "Acting Deputy"), thus placing their future tenure at hazard and assuring that they would be more responsive to control.[39] Mr. Reynolds has limited the use of special masters to oversee implementation of successful court orders,[40] mandated that the Section should not "interfere" with a state's determinations as to the relief it should implement to correct its own constitutional violations,[41] and that, where possible, the Section's litigation should be tailored to the narrow legal view

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38/ Memorandum from Smith to Giuliani, Jenson, Carlson and Turner (March 27, 1981).

39/ The Administraton finally appointed a new "Deputy" in July, 1982.

40/ *Cf.*, *e.g.*, New York Association for Retarded Children v. Carey, No. 72-C-356 (E.D.N.Y.) (U.S. argues defendants in contempt, but does not join in plaintiffs' request for appointment of a special master); Canterino v. Wilson, C.A. No. C80-0545-L(J) (W.D. Ky.) (special master not sought in complaint); Ruiz v. Estelle, C.A. No. H-78-987 (S.D. Tex.) (U.S. takes no position on State's pending allegations that actions of special master are improper and request for amendment of mastership)-- *see* n. 8 *supra*.

41/ *See* Remarks of William Bradford Reynolds before National Conference of Governors (Feb. 21, 1982) at 4-5. *Cf.*, *e.g.*, Ruiz v. Estelle, App. No. 81-224 (5th Cir.), Brief of United States at 93; Newman v. Alabama, App. No. 81-8003 (11th Cir.) (U.S. takes no position on issue of relief); Gates v. Collier, C.A. No. 66-71-6-K (N.D. Miss.) discussed at p. 15-16, 105-06 *infra*.

espoused by Justice William Rehnquist, that federal due process protections are limited to rights conferred by state law.[42]

To police the staff, the Administration's supervisors accept direct complaints from adversaries in the Section's litigation, and give even assertions and claims rejected in the past de novo review. On at least two occasions, the Deputy Attorney General, the number two person in the Department, demanded transcripts of arguments presented in court by Section attorneys. In light of such "support" from above, initiatives on the part of line attorneys are chilled; they advise that self-censorship is rampant.

Encouraged by the obvious rift between the administration's policymakers and the line staff, state defendants accused of constitutional abuses appear to feel free to seek protection from highly placed administration officials. In one such suit Mr. Reynolds personally negotiated directly with the state, bypassing the Section's staff attorneys who had worked on the case for several years.[43] In another well-publicized case involving the Mississippi prisons, the Special Litigation Section sought an order permitting federal agents to inspect county jails to ensure compliance with standards set by the court. Unbeknownst to the attorneys litigating the case, Deputy Attorney General Schmults, in private discussions with Mississippi Congressman Trent Lott, agreed to rely on an inspection by the State's own officials.[44] When the staff attorneys continued to investigate the state's compliance with the court order, Lott sought, though unsuccessfully, to have them discharged:

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[42] Cf., e.g., Pennhurst State School & Hospital v. Halderman, App. No. 78-1490 (3d Cir.), Brief for United States at 27; Kentucky Association of Retarded Citizens v. Conn, App. No. 80-3560 (6th Cir.), Amicus Brief for United States (filed with motion for leave to file on December 2, 1981) at 7, 8; Mills v. Rogers, 102 S.Ct. 2442 (1982) (U.S. fails to file amicus brief in case alleging federal right to treatment); Santana v. Collazo, C.A. No. 75-1187 (D. P.R. Feb. 15, 1982) at 8-9 ("Neither Plaintiffs nor Plaintiff-Intervenor make any pretense at alleging said 'right' [to treatment] by reason of any Federal Statute").

[43] See pp. 93-4.

> I want to know ... why [a named staff attorney] has not been fired. There are too many lawyers ready and eager to carry out Ronald Reagan's policies to permit those policies to be subverted by mere civil servants.45/

B. Deference to Defendants' Remedial Plans

A more tangible policy shift has been Mr. Reynolds' expressed, unambiguous desire to settle cases to the satisfaction of state defendants.[46] In Ruiz v. Estelle,[47] the largest prison case in which the Section is currently involved, Mr. Reynolds excluded Section attorneys and personally negotiated with state officials to reduce the

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44/ The Clarion Ledger (Jackson), p. 18A, col. 2-3 (July 22, 1981)

45/ Letter from Lott to Schmults (October 21, 1981), quoted in Leadership Conference on Civil Rights, Without Justice, 73-74 (Feb. 1982).

46/ Remarks of William Bradford Reynolds before National Conference of Governors (Feb. 21, 1982) at 4.

47/ C.A. No. H-78-987 (S.D. Tex.).

relief ordered by the district court up to the moment that he himself argued the appeal before the Fifth Circuit.[48] Mr. Reynolds has continued his attempts to settle Ruiz, excluding from the negotiations not only counsel for the plaintiffs on whose behalf the government originally intervened, but also the Section attorneys who have handled the case for the last four years.

The brief Mr. Reynolds directed to be filed in the Ruiz appeal abandoned positions the Special Litigation Section had urged in the court below:

> In three areas we have determined that the remedial order exceeded proper bounds:
> (1) too overly specific requirements governing the manner of relieving overcrowding ...;
> (2) an improper delegation of authority allowing the Special master to modify the staffing patterns ordered by the court ...;
> (3) provisions limiting the size, structure and location of prison units.[49]

It also asserted that some aspects of the district court's order, which the Section itself had advocated below, "unduly interfere with the operation of the State's Prison System."[50] It further agreed with Texas

> that the district court's order in this regard went further than was necessary to remedy the constitutional violation the court had identified

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[48] App. No. 81-2224 (5th Cir.).

[49] Id., Brief of United States, at 56.

[50] Id. 93.

> ... it should be up to the state to determine how that requirement is going to be met.[51]

The net result was that the Division urged reversal, in part, of an order it had advocated in the lower court.[52]

The Section has not been permitted to take positions on critical disputed issues in its cases. In one set of consolidated cases involving overcrowding in the Alabama prisons,[53] the district court several times found the state in non-compliance with its order.[54] Frustrated by the state's recalcitrance, the court ordered 352 prisoners released (later reduced to 290), and the state appealed. A staff attorney in the Special Litigation Section drafted an appellate brief supporting the district court's decree, but Mr. Reynolds ordered that the government take no position on appeal. Likewise, in a departure from past practice, the Justice Department declined to file briefs as *amicus* in two significant pending Supreme Court cases in which *certiorari* had been granted to decide important constitutional issues regarding inmates' rights in state mental health facilities.[55/]

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[51] *Id*. 94-95.

[52] *Id*. 93, 127.

[53] Newman v. Alabama, C.A. Nos. 3501-N, 74-57-N, 74-203-N (M.D. Ala.)

[54] *Id*. *See* history recited in Newman v. Alabama, 466 F. Supp. 628 (M.D. Ala. 1979) and Newman v. Alabama, C.A. Nos. 3501, 74-57-N, 74-203- (M.D. Ala.) (Order of October 9, 1980) (finding further non-compliance). *See also* Pugh v. Locke, 406 F. Supp. 318 (M.D. Ala. 1976), *aff'd*, 559 F.2d 283 (5th Cir. 1979).

Perhaps the most blatant refusal to act involved allegations of racial segregation in a North Carolina prison. Section attorneys had negotiated with the prison officials to remedy the problem. When they recommended to Mr. Reynolds that a suit be initiated, his response was to meet personally with a lawyer for the state and allow an additional six months for it to remedy the violation. When that grace period ended he chastised Section attorneys who reminded him that the deadline had passed. More than a year after suit was recommended, North Carolina has not corrected the problem and Mr. Reynolds has not approved any enforcement action.

C. Non-Litigation Policy Shifts

The Administration's intent to limit the Special Litigation Section's ability to oversee state compliance with acceptable prison standards is evident in non-litigative contexts as well. At the end of the Carter Administration, the Department issued and published comprehensive regulations that were required by the Institutionalized Persons Act,[56/] setting forth minimum standards for inmate grievance

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[55/] See Romeo v Youngberg, 644 F.2d 147 (3d Cir. 1980) (en banc), vacated and remanded, 102 S.Ct. 2452 (1982); Rogers v. Okin, 634 F.2d 650 (1st Cir. 1980), vacated and remanded sub nom. Mills v. Rogers, 102 S.Ct. 2442 (1982).

[56/] 42 U.S.C. § 1997e(b)(1).

procedures in state institutions and establishing a method for federal certification of the procedures.[57] The regulations were the product of a cooperative work effort of a Justice Department committee, including representatives of the Special Litigation Section and the Bureau of Prisons. Within two months of the rules' issuance, Attorney General Smith deferred their implementation.[58] Four months after that, the old rules were amended, without opportunity for public comment.[59] The new scheme limited inmate participation in grievances[60] (perhaps to a level below federal statutory requirements),[61] eliminated provisions for outside review of grievances concerning correctional policy,[62] and removed requirements assuring that grievance procedures be fully explained to inmates and that inmates incapable of filing grievances receive necessary assistance and training.[63] Despite these substantial changes, the committee that had worked on the initial regulation was not consulted before - or after - the final issuance of the amendments.

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[57] 46 Fed. Reg. 3843-3852 (January 16, 1981).

[58] 46 Fed. Reg. 16100 (March 11, 1981).

[59] 46 Fed. Reg. 36843-36869 (July 16, 1981).

[60] *Compare* 46 Fed. Reg. at 36866, 36867 (July 16, 1981) (§§ 40.2, 40.7(b)) *with* 46 Fed. Reg. at 3845, 3846 (January 16, 1981).

[61] *See* 42 U.S.C. § 1997(e)(b)(2)(A). *See also* Letter of Edward I. Koren (ACLU National Prison Project) to Michael Pearlman (Federal Bureau of Prisons) (August 17, 1981).

[62] *Compare* 46 Fed. Reg. at 36867 (July 16, 1981) (§ 40.7(f)) *with* 46 Fed. Reg. at 3847 (July 16, 1981).

[63] *Compare* 46 Fed. Reg. at 36866-67 (July 16, 1981) (§ 40.3) *with* 46 Fed. Reg. at 3846 (§ 40.3) (July 16, 1981).

Similarly, on July 23, 1981, Attorney General Smith unilaterally withdrew the preamble to Federal Standards For Prisons and Jails, which the previous Administration had issued.[64] His cursory statement emphasized that "[p]enal institutions are free to utilize these guidelines or not as they see fit" and that "[t]hese standards create no legally enforceable rights or expectations of any kind."[65] He also noted, in the face of the newly enacted Institutionalized Persons Act, which explicitly imposed federal constitutional standards upon state institutions, that "in the event of violations of law, remedies must be imposed that afford maximum discretion to a penal institution to bring its conditions up to an acceptable environment ..."[66]

D. Policy Changes in Pending Litigation

Seeds of retrenchment of the Special Litigation Section's attitudes have begun to sprout throughout its litigation. In the appeal of Pennhurst State School & Hospital v. Halderman, for example, Mr. Reynolds indicated that he intended to take a substantive position on the scope of the law that prohibits discrimination on the basis of handicap that would directly contradict the Special Litigation Section's previous stance,[67] and that would substantially limit the scope of future cases involving the Act.[68]

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[64] Federal Standards for Prisons And Jails (GPO, December 16, 1980).

[65] "Change in Preamble of Federal Standards for Prisons and Jails, December 16, 1980" (July 23, 1981).

[66] Id.

The Justice Department also served notice that it may be prepared to reverse the positions it took Ruiz v. Estelle concerning the scope of due process safeguards in correctional facilities. It supported Supreme Court review for a case that seeks reversal of a decision granting stringent due process protections to prisoners who are transferred to administrative detention.[69]

The most significant and distressing policy stance has come to light in recent weeks, in reaction to the Supreme Court's decision in Youngberg v. Romeo.[70] In Romeo, private plaintiffs urged the Supreme Court to declare a constitutional right to treatment for persons in state mental retardation institutions. The divided Court issued a narrow opinion, upholding such a right insofar as necessary to "ensure [residents'] safety and to facilitate [their] ability to function free from bodily restraints."[71] The Court noted, however, that "[i]n view of the kinds of treatment sought by respondent and the evidence of record, we need go no further in this case."[72] It thus expressly declined to reach the argument, made by the Justice Department in other cases, that inmates have a constitutional right to treatment, including the right to community placement where appropriate, psychiatric services, and special education.[73]

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[67] See, e.g., Halderman v. Pennhurst State School & Hospital, C.A. No. 74-1345 (E.D. Pa.), Post-trial Memorandum of the United States, App. No. 78-1490 (3d. Cir.), Brief for the United States (filed October 2, 1978) at 40-41, 61.

[68] See Pennhurst State School & Hospital v. Halderman, App. No. 78-1490 (3d Cir.), Brief for United States 27 (filed October 14, 1981) (emphasis added).

[69] See Memorandum for the United States as Amicus Curiae, Hewitt v. Helms, ___ U.S. ___, No. 81-638 (filed October, 1981).

[70] 102 S.Ct. 2452 (1982).

Shortly after Romeo was issued, Mr. Reynolds presented each of the Special Litigation Section's staff attorneys with a copy of a handwritten memorandum instructing them that, in his view, Romeo had ruled against a right to treatment beyond that necessary to assure an inmate's safety in his institution. He thus declared that henceforth the Section would no longer be permitted to rely on the due process theory to promote inmates' rights. This unduly restrictive reading of Romeo, if adhered to, would severely undercut the Section's position in most of the mental health litigation in which it is involved. Section attorneys have submitted a ten-page rebuttal of Mr. Reynolds' views, asking him to reconsider. On August 25, 1982, he decided not to change his position.

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[71] Id. at 2462

[72] Id. at 2460

[73] The Supreme Court expressly left this issue open:

> If, as seems the case, respondent seeks only training related to safety and freedom from restraints, this case does not present the difficult question whether a mentally retarded person, involuntarily committed to a state institution, has some general constitutional right to training per se ...."

Id. at 2459.

IV. The Special Litigation Section - Which Way The Future?

Unlike many areas of civil rights, the Administration's changes in posture concerning institutional litigation have, for the most part, been more subtle and less abrupt. But the handwriting is on the wall.

The available statistics, although not conclusive, are nonetheless revealing. In 1977, the first full year of the Carter Administration, and before the Institutionalized Persons Act was passed, the Section filed 11 new cases and intervened in three others. During 1975, President Ford's first full year, the Section's predecessors appeared as amicus or intervenor in about 20 new institutional cases. The Reagan Administration failed to file a single complaint until its fifteenth month. Moreover, the U.S. Commission on Civil Rights has recently reported that the Division's planned effort in this area is "unlikely to afford ... full protection" to the institutionalized persons suffering civil rights violations.[74]

It remains too early to evaluate the full course this Administration's institutional litigation will take. While the philosophy expressed by

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[74] United States Commission on Civil Rights, The Federal Civil Rights Enforcement Budget: Fiscal Year 1983, at 37 (June 1982).

Mr. Reynolds lends credence to the expectation that significant retrenchment will occur in the area of civil rights for handicapped and institutionalized persons, the Administration has not yet been fully tested; the signs of change, discussed above, have still been relatively few.

Since the issuance of a critical report by the Leadership Conference on Civil Rights, [75] feverish activity has been evident within the Section to bolster its claims of commitment to institutional litigation. A few new investigations have been commenced, and observers postulate that some new lawsuits may even be filed. Over the long haul, however, the crucial issue will not be the number of cases the Section institutes, but the legal positions it is ordered to take. It remains to be seen whether protestations of "commitment" to the Section's goals are, in fact, empty rhetoric or reality.

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[75] Leadership Conference on Civil Rights, Without Justice 73-74 (Feb. 1982).

Chapter Five

FEDERAL ENFORCEMENT SECTION -- DISCRIMINATION IN EMPLOYMENT

A. Background and History of the Federal Enforcement Section

The present Federal Enforcement Section of the Civil Rights Division was formed in 1979. It is the successor to the Division's Employment Section, which since 1969 had responsibility for the Division's equal employment opportunity activities.[1]

The primary legal prohibition against employment discrimination is Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e *et seq*. Until 1972 the Employment Section was the only federal office empowered to bring suit to enforce Title VII, because the Equal Employment Opportunity Commission ("EEOC") could seek only to conciliate complaints.[2] The 1972 amendments to Title VII, however, transferred to the EEOC concurrent authority to bring suit against private employers. Since 1974, when the EEOC's authority to sue became exclusive, the Division's jurisdiction has been limited primarily to systematic patterns and practices of employment discrimination by state and local governments.

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[1] United States Commission on Civil Rights, The Federal Civil Rights Enforcement Effort 118 (1971); *1979 Annual Report of the Attorney General of the United States* at 111.

[2] United States Commission on Civil Rights, *To Eliminate Employment Discrimination: A Sequel* (1977) ("1977 CRC Report") 245-47.

recipients of federal financial assistance, and federal government contractors.[3] These functions were performed in 1974-79 by the Employment Section and the litigation component of the Federal Programs Section. In 1979, these offices were merged into the newly-created Federal Enforcement Section.

Over the years, the Division has built an admirable reputation as an opponent of employment discrimination. In particular, the Section has received high marks from civil rights groups and others for helping to achieve its "primary objective" of "making good equal employment opportunity law."[4] During both Republican and Democratic administrations, the Division has contributed significantly to the development of Title VII case law, both in the area of liability and remedy. For example, the Division obtained two of the earliest appellate decisions holding that Title VII prohibits not only overt, purposeful discrimination, but also bans racially neutral practices that perpetuate the effects of past discrimination.[5] Similarly, the Division has been active in other cases concerning the discriminatory use of tests and other selection procedures.[6/]

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[3] Id. at 247-52.

[4] Id. at 275. See also id. at 263, 276.

[5] Id. at 276 n.76. See Local 189, United Papermakers v. United States, 415 F.2d 980 (5th Cir. 1969), cert. denied, 397 U.S. 919 (1970); United States v. Local 36 Sheet Metal Workers, 416 F.2d 123 (8th Cir. 1969). These decisions were followed by the Supreme Court's similar holding in Griggs v. Duke Power Co., 401 U.S. 424 (1971), in which the Division participated as amicus curiae.

Equally important, the Division has helped to shape appropriate remedies for violations of the employment discrimination laws. As the Division itself noted, its arguments in United States v. Local 53, Asbestos Workers, 407 f.2d 1047 (5th Cir. 1969), "first established the principle that affirmative steps must be taken to correct the effects [of] past discriminatory employment practices."[7/] The Division has similarly stated that "the landmark decisions sustaining the use of numerical goals and timetables as a remedy for past discrimination were either in cases brought by the Civil Rights Division ... or in which the Division participated as amicus."[8/] Cases involving such remedies as backpay and retroactive seniority have also been litigated successfully by the Division,[9/] during both Republican and Democratic Administrations.

6/ E.g., United States v. City of Chicago, 549 F.2d 415 (7th Cir.) cert. denied, 434 U.S. 875 (1977); United States v. Jacksonville Terminal Co., 451 F.2d 418 (5th Cir. 1971), cert. denied, 406 U.S. 906 (1972).

7/ 1977 CRC Report at 277 n.76 (quoting a memorandum of the Chief of the Employment Section).

8/ Id. E.g., United States v. Local 86, Ironmakers, 443 F.2d 544 (9th Cir. 1971).

9/ See 1977 CRC Report at 277 n.76.

B. The Federal Enforcement Section Under the Reagan Administration

In view of the historical objective of the Division to develop favorable equal employment opportunity case law, the efforts of the Civil Rights Division in the employment discrimination area under President Reagan can best be assessed by reviewing its performance in that area. Such a review demonstrates that under the Reagan Administration, the Division has departed significantly from its own practices and from the case law requirements that the Division itself helped to establish.

Specifically, the Division has completely reversed its previous position concerning the appropriate relief in Title VII cases. Although the Division itself helped to establish the principle that affirmative actions, such as numerical goals and timetables, may be necessary in some cases to remedy employment discrimination, the Division has now stated that it will not advocate such remedies in any cases, even where an employer has engaged in a pattern or practice of discrimination.[10] Assistant Attorney General Reynolds has announced that he will seek a test case to overturn the Supreme Court's decision upholding affirmative action plans in United States Steelworkers v. Weber, 443 443 U.S. 1971 (1979).[11]

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[10] Testimony of William Bradford Reynolds before the House Subcommittee on Employment Opportunities (September 23, 1981) ("1981 House Testimony") at 5, 13-16; Remarks of William Bradford Reynolds before 35th National Conference on Labor (June 11, 1982) at 2, 3.

1. Rejection of Affirmative Action in All Circumstances

Mr. Reynolds has stated that affirmative action remedies will be replaced by injunctions that prohibit discrimination, by increased emphasis on the recruitment of women and minorities, and by backpay and seniority awards to identified victims of discrimination. According to the Assistant Attorney General, Title VII should provide remedies only for those individuals who can be identified as victims of discrimination, and not for other members of their class. The ideological basis for the rejection of affirmative action in Title VII cases is the concept, often invoked by Attorney General Smith and Mr. Reynolds, that the Constitution is "color blind" and countenances no discrimination, not even to remedy past discriminatory practices.

This view is, or course, contrary to the Supreme Court's decision in the Weber case, and is tantamount to an announcement that the Civil Rights Division will not enforce the law of the land, so Mr. Reynolds was virtually required to declare his intentions to seek reversal of Weber. Significantly, Mr. Reynolds claims no novel legal theory or newly discovered legislative history on which to argue his test case.

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[11] Remarks of William Bradford Reynolds before Tenth Annual Conference of Executive Enterprises, Inc., ("Tenth Annual Conference") (Jan. 22, 1982) at 4; Wall Street Journal, "Civil Rights Head will Seek Supreme Court Ban on Affirmative Action" (December 8, 1981).

Rather, it is based on his philosophical disagreement with the Court's decision. The Administration can accommodate this view because, as Mr. Reynolds has stated, it believes that "racial and other stereotyping is declining and most people now accept the legal and moral imperative to treat people equally ..."[12/] In other words, as with school desegregation, the Administration has simply decided that employment discrimination is no longer a serious problem.

This virtual repudiation of bipartisan federal law is a dramatic shift. For over twenty years, affirmative action has been a part of the federal government's strategy for combating discrimination. Since President Kennedy signed Executive Order 19025, the laws of Congress and the orders of the Executive have continued to encourage employers to take deliberate affirmative steps to bring about equal employment opportunity.[13/] Indeed, in enacting Title VII, Congress gave the courts express authorization to use "affirmative action ... or any other equitable relief as the court deems appropriate."[14/]

[12/] Remarks of William Bradford Reynolds before the Conference on Equal Employment Opportunity in the Public Sector (Feb. 1, 1982) at 3.

[13/] See 26 Fed. Reg. 1977, 1959-63 Comp. 448; 30 Fed. Reg. 12319 (Sept. 24, 1965), as amended by Exec. Order No. 11375, 32 Fed. Reg. 1430 (Oct. 13, 1967), 3 C.F.R. 406; 42 U.S.C. § 2000e note (1970), as amended by Equal Opportunity Act of 1972, Pub.L. No. 92-261, 86 Stat. 103. See also Contractors Ass'n of Eastern Pennsylvania v. Secretary of Labor, 442 F.2d 159, 168-71 (3d Cir.), cert. denied, 404 U.S. 854 (1971).

[14/] 42 U.S.C. § 2000e-5(g). See Contractors Ass'n of Eastern Pennsylvania v. Secretary of Labor, 442 F.2d 159, 173 n.47 (3d Cir. 1971).

The courts have utilized this authority, often at the request of the Division itself, to combat proven discrimination through affirmative action plans, including goals and timetables, where necessary to remedy entrenched discrimination.[15] This has not resulted from a failure to achieve "statistical parity"; instead, courts have frequently concluded that only affirmative relief could successfully end discriminatory practices by recalcitrant employers.[16] As one court explained in upholding the use of goals and timetables at the urging of the Division itself, "Congress did not intend to freeze an entire generation of ... employees into discriminatory patterns that existed before" Title VII; affirmative relief is necessary so that "the effects of past discrimination in job assignments could be overcome."[17] And, as the U.S. Commission on Civil Rights emphasized last year, affirmative action remains necessary to achieve meaningful success in combating the continuing problem of employment discrimination, Mr. Reynolds' personal views notwithstanding.[18]

15/ *E.g.*, Castro v Beecher, 459 F.2d 725 (1st Cir. 1972); Carter v. Gallagher, 452 F.2d 327 (8th Cir. 1971), *cert. denied*, 406 U.S. 950 (1972). Virtually all the federal courts of appeal have approved such remedies. *See* U.S. Commission on Civil Rights, Affirmative Action in the 1980s: Dismantling the Process of Discrimination (1981) ("1981 CRC Report") at 22 n.60.

16/ *E.g.*, NAACP v. Allen, 493 F.2d 614 620-31 (5th Cir. 1974) (explaining that "quota relief was essential to make meaningful progress" since "no Negroes were hired" until "affirmative relief" was ordered); Vulcan Society v. Civil Service Comm., 490 F.2d 378, 398 (2d Cir. 1973) (holding that "no other method" besides affirmative remedy "was available for affording appropriate relief").

17/ Contractors Ass'n, *supra*, 442 F.2d at 173.

18/ *See* 1981 CRC Report.

Under these circumstances, the Division's shift in position has important practical consequences. Instead of requesting affirmative hiring and promotion relief the Division has announced that it will now seek to rely - almost exclusively - on recruitment programs to combat discrimination,[19] as exemplified by the consent decree in United States v. Vermont, No. 81-380 (D. Vt. 1981).[20] So long as an employer's pool of applicants includes women and minorities, according to this policy, sufficient affirmative remedial action has been taken without regard to the number that are actually hired. In the view of some Section attorneys, the consent decrees provide woefully inadequate reporting and monitoring provisions, and they are concerned that these agreements are, in reality, not enforceable.

Such an exclusive focus on recruitment practices is ineffective, impractical, and contrary to established case law. It is ineffective because it ignores discrimination in promotions, where the "applicant" pool is predetermined by the pre-existing work force, and because it allows an employer to continue to discriminate in actual hiring decisions so long as the pool of applications from women and minorities is sufficient, even if none are hired. It is impractical because effective monitoring of compliance would require the Division to review detailed information on recruitment activities at a time when the Division's staff, and its inclination to monitor, is being reduced.[21] And it is contrary to established case law because it ignores the frequent holdings of the federal courts that affirmative remedies are permissible and indeed required in certain cases.[22] As Justice Blackmun explained in the Bakke case, there is often "no other way" to "get beyond racism" than to "take account of race" in seeking to remedy entrenched patterns of discrimination.[23]

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[19] See Tenth Annual Conference at 12; 1981 House Testimony at 11; Remarks of William Bradford Reynolds Before the Delaware Bar Association (Feb. 22, 1982) at 6.

[20] Similar settlements have been or will be entered into in cases against state police forces in New Hampshire, Rhode Island, Massachusetts, Connecticut and Virginia.

Mr. Reynolds has also advised the EEOC that his interpretation of the law will impact the affirmative action plans of federal agencies as well. In a letter to the EEOC he advised that the Department "is unable to conclude at present that there is statutory authority for compelling [the] use [of goals and timetables] in affirmative action planning."[24] A copy of the letter went to the head of each federal agency. The potential result is that the federal government, one of the most aggressive employers of women and minorities, may begin to limit its own hiring obligations.

The Division's policies can also be expected to have a chilling effect on meaningful affirmative action efforts in private litigation

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21/ See United States Commission on Civil Rights, The Federal Civil Rights Enforcement Budget: Fiscal Year 1983 (June 1982) at 29-31.

22/ See pp. 5-6, supra.

23/ Bakke v. Board of Regents, 438 U.S. 265, 307 (1978) (opinion of Blackmun, J.)

24/ Letter from W. Bradford Reynolds to J. Clay Smith, Acting Chief of EEOC (Sept. 22, 1981) not involving the Civil Rights Division. This policy shift sends a clear message to employers: Not only will the federal government no longer seek affirmative action as a remedy, the Justice Department now suggests, but it may also sue an employer who voluntarily institutes an affirmative action plan in order to test the Weber decision. There is a clear, official signal that the federal government has retreated from the battle against employment discrimination and a suggestion that employers may now do the same.

In many employment discrimination cases, of course, affirmative hiring remedies are neither necessary nor appropriate. But for the Division to abandon them entirely, and not evaluate each situation on its individual merits, weakens its ability to negotiate, discourages voluntary affirmative action efforts and forecloses the possibility of meaningful relief in some cases. This retreat is further evidence to women and minorities that the Civil Rights Division is no longer its ally.

2. Discriminatory Job-Testing

The Division's retreat from the requirements of applicable case law and its own historical positions in employment discrimination litigation has not been limited to the area of affirmative action. In Connecticut v. Teal, 102 S.Ct. 2525 (1982), the Department of Justice joined the defendant, the State of Connecticut, in contending that a plaintiff should not be able to make out a *prima facie* case of employment discrimination by proving that a job test used by an employer operates to discriminate against minorities where, independent of the use of the allegedly discriminatory test, the employer has hired significant numbers of other minority employees. See id. at 2534-35. This position was taken although the Division itself, under both Republican and Democratic administrations, has supported and helped establish the well-recognized principle that the use of tests which discriminate against minorities constitutes a violation of Title VII.

Interestingly, the Department's argument in Teal contradicts not only its past positions, but also the position it has most recently taken concerning affirmative action. In the affirmative action area, as discussed above, the Division has argued that Title VII should be interpreted to provide remedies only for individual victims of employment discrimination, and that remedies directed at increasing the number of minority employees in an employer's work force are not justified. In Teal, however, as the Supreme Court specifically noted, the State of Connecticut and the Justice Department took the position that Title VII effectively granted an employer a "license to discriminate" against an "individual employee" on the grounds of race or sex "merely because [the employer] favorably treats other members of the employees' group." Id. at 2535. The only consistent principle which explains the Division's conflicting stance in these two areas is a simple one -- when in doubt, favor the employer.

The Supreme Court's opinion in Teal draws attention to another interesting aspect of the Department's change in position, as reflected in its participation in that case. The Court specifically noted that the Government's brief in Teal was submitted by the Department of

Justice, which "shares responsibility for federal enforcement of Title VII" with the Equal Employment Opportunity Commission. But the EEOC, the court observed, "declined to join" the Department's brief. Id. at 2533 n.11.

The Supreme Court rejected the position advocated by the Department in Teal. The Court held that in accordance with the long-standing decision in Griggs v. Duke Power Co., 401 U.S. 424 (1971), a test which operates to discriminate against minorities and which cannot be shown to be "job-related" violates Title VII, regardless of whether the employer has "favorably treated" other members of the minority group. Teal, supra, 102 S.Ct. at 2533-35. The Justice Department's arguments to the contrary, the Court noted, would have created a "special haven for discriminatory tests," in violation of Title VII. Id. at 2533. The unequivocal rejection by the Supreme Court of the Division's position in Teal provides further evidence that the Division has abandoned vigorous enforcement of Title VII.

Chapter Six

COORDINATION AND REVIEW SECTION -- DISCRIMINATION IN FEDERALLY FUNDED PROGRAMS

A. Introduction--History and Background of the Coordination and Review Section.

The most important non-litigation function of the Civil Rights Division is performed by the Coordination and Review Section. The Section was created during the Carter Administration, as the Sex Discrimination Task Force, to review federal statutes and regulations for sex bias. After an internal reorganization, the Task Force became the Office of Coordination and Review, which was assigned responsibility for government-wide coordination of Title VI enforcement by the Attorney General. The Office was elevated to the status of a Section in 1980 and now, under Executive Order 12250 (Nov. 2 1980), it is responsible for the government-wide coordination of all federal government activities to prevent discrimination in federal programs or programs benefiting from federal assistance on the basis of race, national origin, sex, or handicap. See 45 Fed Reg. 72995 (Nov. 4. 1980). The Section is not responsible for age or political discrimination, nor does it engage in litigation.

Under Executive Order 12250, the Justice Department is responsible for coordinating the implementation and enforcement of three laws designed to prevent discrimination in federally assisted programs: (1) Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d et seq., which bans discrimination on the basis of race, color, and national origin; (2) Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, *et seq.*, prohibiting sex discrimination in educational programs; and (3) Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, which prohibits discrimination on the basis of handicap in federally conducted and assisted programs. In its coordination role, the Section has both the authority and responsibility to ensure that all Federal agencies enforce their non-discrimination mandates under these statutes, publish implementing regulations consistent with uniform minimum standards promulgated by the Section, and allocate adequate resources to meet this task.

The Section, then, is intended to be the federal government's primary civil rights coordinator - the manifestation of the Division's symbolic role of advocate for minorities and handicapped persons with federal agencies. Significantly, the Section's activities for the first twenty months of the Reagan Administration indicate a virtual abdication of this role. To date, its actions have consisted of the piecemeal reviewing and approving (or requiring changes in) the regulations proposed by other federal agencies, and the drafting of one set of regulations, which have not yet even been published for comment.

B. Failure to Publish Minimum Guidelines

As indicated above, the 1980 Executive Order 12250 intended to eliminate inconsistent federal civil rights rules by requiring the Civil Rights Division to promulgate minimum standards for all agencies to adopt. This, it was believed, would promote fair and uniform regulations and relieve some of the complex burdens federal agencies faced in attempting to comply with the sophisticated civil rights laws. President Reagan has not rescinded or modified that Order, and it remains in full force.

Nevertheless, in its first twenty months the Section has failed even to publish proposed minimum guidelines. Federal agencies continue to submit for prior review their own internally developed regulations, and the Section's personnel continue to sift through them on a case-by-case basis. This omission has been caused, in some measure, by an insufficient allocation of resources to the Section.[1/] This staff shortage, according to the U.S. Commission on Civil Rights, also impedes the Section's ability to review thoroughly the proposed regulations it does receive, and prevents meaningful monitoring and evaluation activities to determine if agencies are actually following their own rules.[2/]

C. Draft Regulations for Enforcement of Discrimination Laws*

The Section's primary regulatory activity during its first twenty months, aside from reviewing individual agency proposals, has been to

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[1/] United States Commission on Civil Rights, The Federal Civil Rights Enforcement Budget: Fiscal Year 1983 (June, 1982) at 39.

[2/] Id.

* As noted in the preceding section, no regulations have actually been proposed or adopted; therefore it is necessary to review in detail draft documents still within the Division. These drafts are fungible and often change on a daily basis. This discussion centers on a draft that was circulated to other agencies for comment in early 1982. As will be indicated where appropriate, some of its terms and concepts have since been modified.

draft about one-half of the required minimum standards, although none have even been proposed for adoption. One portion of these drafts involves the procedural mechanisms that agencies must follow in promulgating and determining violations of their rules.

1. Monitoring Compliance

At the insistence of the Office of Management and Budget (OMB), the initial draft of the coordinating regulations for the procedures that federal agencies must follow in monitoring their grants was intended to reduce the regulatory burden upon the recipients of federal financial assistance. The Division sought to accomplish this goal in three important ways.

First, the new draft regulations simply redefine, in a more narrow fashion, the term "recipient." In past Administrations that term properly included indirect federal financial assistance that "benefited" the agency, which therefore was prohibited from discriminating by federal law. The draft specifies that instead the financial assistance must flow directly to an agency or institution in order for the anti-discrimination laws to apply. This significantly reduces the coverage of federal laws.

Second, the draft regulations would limit the ability of federal agencies to require recipients to provide them with detailed information concerning civil rights compliance. Current practice permits agencies to collect such data on a routine basis. The proposal would permit survey information only after complaints had been received about a particular recipient, or when there were some special circumstances to justify the need for the material.

Third, the draft regulations limit the agencies' ability to conduct compliance reviews. At present, each agency determines when and how to monitor its recipients. The Division's draft suggests that reviews be conducted only upon the largest recipients. OMB has urged that monitoring, like data collection, be conducted only when an agency can justify its need.

The thrust of these changes is clear. Under the guise of removing "undue" regulatory burdens, the Administration is relaxing enforcement of the civil rights laws. In the overall scheme of things, enforcement of those laws is simply not a priority matter.

2. Rights of Handicapped Persons

The only substantive regulation currently in draft form concerns the provisions for enforcing prohibitions against discrimination on the basis of handicap. According to some Section personnel, these regulations were selected first because the Administration believed that handicapped persons were fewer or less well-organized than women and racial minorities thus making easier the task of cutting back the level of civil rights protections currently available. Once these changes were adopted and in place, they would provide a model and a precedent for similar changes in sex and race regulations.

If this was indeed the theory behind the Division's drafting priorities, the strength of advocacy groups for the handicapped was seriously underestimated. Copies of the original draft rules were obtained by the interest groups.[3] Their protests have led to subsequent revisions, and no rulemaking proposals have yet been published. It is uncertain at present when the rules will be published, or what their final form might be. But it is instructive to review the original draft in greater detail, because the changes proposed in protecting handicapped people will very likely be transported to race and sex discrimination as well.

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[3] See Washington Post (March 4, 1982) at A27.

Section 504 of the Rehabilitation Act of 1973 prohibits discrimination on the basis of handicap by federal executive agencies and by programs or activities that receive federal financial assistance.[4/] This statute is the major piece of civil rights legislation for disabled people, and demonstrated Congress' strong commitment to ending discrimination based upon handicap.

The Department of Health, Education and Welfare was initially designated as the lead agency for coordination of consistent, government-wide enforcement of Section 504, under Executive Order 11914 (April 28, 1976).[5/] After extensive nationwide pressure from disability groups, HEW published guidelines for implementing Section 504 on January 13, 1978.[6/] These guidelines set forth enforcement procedures, standards for determining which persons are handicapped, and general guidelines for determining what practices are discriminatory. Each federal agency

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[4/] 29 U.S.C. § 794.

[5/] 41 Fed. Reg. 17871.

[6/] 45 C.F.R. § 84.1, et seq.

that provides federal financial assistance is required to use the HEW guidelines as a model for its own regulations implementing Section 504 and a number of federal agencies have published proposed or final regulations intended to implement Section 504.

Responsibility for coordinating the implementation and enforcement of Section 504 was, as noted above, transferred to the Department of Justice in 1980 by Executive Order 12250. Under this Order, the Department must assure that all federal agencies which provide financial assistance have regulations and enforcement procedures which are consistent with the Department's coordination guidelines. The existing HEW guidelines will continue in force until they have been revoked or modified by the Department.

Draft coordination guidelines, dated January 27, 1982, were distributed for comment to federal agencies which provide federal financial assistance, but no official rules have yet been promulgated.

The version of the regulations prepared in January 1982 demonstrates that the Division is attempting to substantially erode existing protections for the civil rights of disabled individuals. Although there have been several revisions of various sections, this draft remains the most "official" version pending distribution of any modifications. Current 504 regulations protect disabled people against discrimination in employment, education, physical accessibility, and many programs and services. The proposed Department draft weakens many of these protections, and will create uncertain and piecemeal enforcement in others. In particular, the draft regulations would produce drastic changes in four areas: general equal opportunity standards, "program specific" coverage, elementary and secondary education, and post-secondary education.

a. General Equal Opportunity Standards.

Existing 504 guidelines and regulations require recipients of federal financial assistance to provide qualified handicapped persons with an "equal opportunity" to participate in and to benefit from federally assisted programs. They also require recipients to provide handicapped individuals with aids, benefits and services which are "as effective as" those provided to others.[7] The Division's draft guideline inexplicably eliminates any reference to equality of opportunity or effectiveness of aids, benefits or services. Later revisions now appear to include this protection, but no definitive conclusions have been reached.

Section 504 is a civil rights statute, prohibiting discrimination against disabled individuals. Without the requirement of an equal opportunity standard in each agency's 504 regulations, recipients will be under no legal obligation to achieve one of the Act's primary goals: to provide meaningful access and equality of opportunity to disabled persons. The Division's proposed regulations would significantly abrogate this goal.

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[7] 45 C.F.R. § 84.4(b)(iii).

b. "Program Specific" Coverage.

Compliance with Section 504 is now required by any "program or activity that receives or benefits from Federal financial assistance."[8] This generally means that if a recipient receives federal financial assistance for one component of its activities, it may not discriminate against handicapped individuals in any of its other programs, since the activities of the entire organization usually benefit from assistance to one subpart.

The Department draft eliminates the phrase "or benefits from" throughout the guidelines. This change drastically reduces 504's coverage. It could result in fractured enforcement efforts. Non-discrimination will be required in some components of a recipient's program but not in others. A handicapped student would face the real possibility of being unable to complete academic work for a degree, if he or she were restricted to only those departments, courses of study, or even classes, which receive direct financial assistance. This pin-point approach would create an administrative nightmare for both the recipient and the enforcing agency. "Program specific" enforcement will similarly create grave enforcement difficulties when federal assistance is channeled through block grants that dilute the federal dollars or make them more difficult to identify.

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[8] 45 C.F.R. § 84.2 (emphasis added).

The Division's proposals directly contradict the purpose and intent of Section 504, as well as applicable judicial precedent interpreting its provisions. Congress intended Section 504 to be a comprehensive remedial tool to eliminate discrimination based on handicap. *NAACP* v. *Wilmington Medical Center, Inc.*[9] It is a familiar canon of statutory construction that remedial legislation should be construed broadly to effectuate its purpose.[10] The federal courts have already ruled that recipient institutions which benefit from federal financial assistance cannot discriminate against handicapped persons in any program or activity under Section 504.[11] The Division's proposed change in coverage of this important civil rights statute reflects another significant cutback in civil rights enforcement.

c. *Elementary and Secondary Education*

In its proposed guidelines, the Department completely eliminates minimum standards for equal opportunity for handicapped students in public elementary and secondary education programs. The draft omits all current requirements that handicapped children be provided an appropriate public education, or that require schools to make accommodations for the unique needs of such children in education programs.[12] It also eliminates the right to be educated in the "regular educational environment" where possible.[13] Later revisions have referred to an "opportunity" to participate in appropriate educational programs, but that is a far cry from the present "right" to so participate.

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[9] 453 F. Supp. 280, 298 (D. Del. 1978).

[10] *Teherepnin* v. *Knight*, 389 U.S. 332, 336 (1967).

[11] *See Wright* v. *Columbia University*, 520 F. Supp. 789 (E.D. Pa. 1981); *Poole* v. *South Plainfield Board of Education*, 490 F. Supp. 948, 951 (D.N.J. 1980) ("[i]t is absurd to ban discrimination in a discrete area of a school system that receives federal funds while permitting it throughout the rest of the system"). In this respect, Section 504 differs from Title VI (42 U.S.C. § 2000d, *et seq.*) and Title IX (20 U.S.C. § 1681, *et seq.*), which the Supreme Court has interpreted as imposing a program-specific limitation on bans against discrimination on the basis of race, national orgin, and sex. *See North Haven Board of Education* v. *Bell*, 50 U.S.L.W. 4501, 4507 (U.S. May 17, 1982). This difference may be explained by the respective legislative histories of these statutes. Compare *North Haven*, *supra*, 50 U.S.L.W. at 4507 (Title IX) with *Poole*, *supra*, 490 F. Supp. at 951 (Section 504).

These protections are basic to equal educational opportunity, and appear in the existing guidelines and Section 504 regulations. Failure to provide an individualized education to handicapped children, with their special needs, would be tantamount to depriving such children of an equal opportunity to education. The Department of Justice has a responsibility under Executive Order 12250 to promulgate comprehensive guidelines that will clarify the obligations of federally assisted programs to provide equal educational opportunity. The courts have frequently held that Section 504 requires school districts which receive federal funds to consider individually the needs of handicapped students within their jurisdiction.[14] Affirmative guidance on the minimum requirements for access to education is also necessary because a substantial

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12/ Cf. 45 C.F.R. § 84.33.

13/ Cf. 45 C.F.R. § 84.34(a).

14/ E.g. Georgia Assoc. of Retarded Citizens v. McDaniel, 511 F. Supp. 1263 (N.D.Ga. 1981); Hairston v. Drosick, 423 F. Supp. 180 (S.D.W.Va. 1976).

proportion of federal aid, from diverse federal agencies, goes to benefit educational programs. These departments need uniform principles of minimum accessibility for school programs to be set out in the coordination guidelines.

d. Post-secondary Education

The Department's draft provides that post-secondary education students would not be considered "qualified" and thus entitled to the benefits of Section 504 if the student's participation in the program would cause an "undue burden" on the school or on other students. Under this provision, a school could argue, for example, that disabled persons with speech impairments create an "undue burden" on other students in a program because their speech is slow or difficult to understand, even though they meet all the academic and technical standards required for participation in the program. Excluding disabled persons because of a perceived "undue burden" is exactly the type of discrimination that Section 504 was intended to eliminate. As the Supreme Court itself has recognized, while Section 504 may not require substantial changes in a program to accommodate disabled persons, the statute flatly prohibits discrimination against any handicapped person "who is able to meet all of a program's requirements in spite of his handicap."[15/]

[15/] Southeast Community College v. Davis, 442 U.S. 397, 406 (1979). See also 45 C.F.R. § 84.3(k)(3).

There is simply no legal support for the Division's attempt to inject a vague and potentially dangerous "undue burden" standard into the enforcement of Section 504.

The thrust of the changes proposed in the 504 draft regulations seems designed to reduce the unreasonable administrative and financial "burdens" the Administration believes the existing regulations place upon the schools, businesses and local governments that receive federal funds. But the changes proposed do not appear to balance reasonably the competing needs of protecting individual rights and eliminating excessive regulation. The draft prepared by the federal entity charged with enforcing the handicap anti-discrimination laws reflects a near abrogation of its legal responsibilities. It is an ominous preview for the revision of similar sex and race regulations that is likely to come before the next presidential election.

D. Suspension of Mass Transit Regulations.

The bulk of the Coordination and Review Section's activities involve the review of regulations submitted by other federal agencies for the purpose of determining their compliance with the government-wide minimum standards. In the case of Section 504 protections for handicapped persons, this means the old HEW regulations, which remain in effect until the Division actually promulgates new ones.

Despite this obligation, the Section has, on several occasions, approved agency regulations that more closely reflect the draft proposals not yet adopted than the existing regulations. In fact, the mass transportation regulations of the HEW guidelines have been suspended for more than a year, so that minimum standards no longer exist in that area.

1. The Department of Transportation Rules

On July 20, 1981, the Department of Transportation (DOT) issued a final interim rule, without notice or public comment, revoking requirements that federally-assisted transportation systems make certain types of access available to handicapped patrons. There was little doubt that the rule was in direct contravention of the existing Section 504 guidelines, but rather than refusing to approve it the Justice Department summarily suspended the applicable guidelines - three weeks after DOT had already published its rule.[16/] The notice stated that the rule suspension was necessary to "ensure that the DOT's rule is not inconsistent with the coordination guidelines issued by the Department of Justice ..."[17/]

2. Civil Aeronautics Board Rules

In June, 1982 the CAB published its final rules with regard to nondiscrimination on the basis of handicap, designed to assure that handicapped individuals have access to air transportation services.[18/] A major concern of handicapped persons was the limited accessibility of most aircraft, such as narrow aisles and small seats, and they requested the CAB to require, consistent with HEW guidelines, that airlines make limited structural modifications to accomodate them.

16/ 46 Fed. Reg. 60687 (August 11, 1981).

17/ Id.

18/ 47 Fed. Reg. 25936 (June 16, 1982).

The CAB, however, relying on Justice's suspension of the mass transportation regulations nearly a year earlier, noted that it was "free to adopt" its own standards and rejected the need for any modifications.[19] Presumably, Justice had, pursuant to Executive Order 12250, reviewed and approved the regulations prior to their publication.

It is of no little significance that an entire portion of the extant regulations were simply suspended more than a year ago. No interim rules have been promulgated, and the final rules, as noted above, have not even been published in a proposed form for public reviw and comment. Under Mr. Reynolds' direction, the Division has simply ignored its responsibilities to coordinate implementation of federal laws and regulations.

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[19] *Id*. at 25940.

Chapter 7

THE CRIMINAL SECTION--CRIMINAL VIOLATION OF CIVIL RIGHTS STATUES

The Criminal Section of the Civil Rights Division has authority to prosecute violations of a variety of Federal civil rights statutes that provide for criminal sanctions. By far the largest number of cases involve misconduct by law enforcement officers (e.g. police, correctional officers, and INS officers) and include instances of brutality, harrassment, witness intimidation, and perjury, among others. These cases are brought primarily under 18 U.S.C. §§ 241 and 242.

Among the non-law enforcement prosecutions concluded by the Section are cases dealing with racially motivated acts of violence, including Ku Klux Klan activity, brought primarily under 18 U.S.C. § 245(b)(2); racially motivated interference with housing rights, brought under 42 U.S.C. § 3631; and involuntary servitude, brought under 42 U.S.C. §§ 1581 and 1583. In addition, the Justice Department has the authority to enforce a variety of little used criminal statutes, including 18 U.S.C. § 2191, which prohibits cruelty to seamen and was invoked recently for the first time in 80 years.

According to Assistant Attorney General Reynolds, the number of criminal prosecutions brought by the Justice Department under the civil rights acts is equal to or greater than the numbers brought by the Department under the Carter and Ford administrations during comparable periods of time. In his February 22, 1982, address to the

Delaware Bar Association, Mr. Reynolds cited, as the first example of the civil rights enforcement efforts of the Reagan administration, the record of the criminal section. He stated that between January 29, 1981, and February 22, 1982, the section had "filed 43 new cases charging criminal violations of the civil rights laws and had conducted trials in 11 other cases that were previously under indictment."[1] According to Reynolds "this level of activity exceeds the 'track record' of prior administrations."[2]

Interviews with the Chief of the Criminal Section and others confirm these figures. During the first half of the 1982 fiscal year, the Department sought indictment in 57 new cases.[3] During the entire 1981 fiscal year, which included nearly four months under the Carter Administration, the Department sought indictments in 62 cases. During the 1980 fiscal year, which was the last full fiscal year under the Carter Administration, the Department sought indictments in 77 cases. In FY 1979 the number was 69, in FY 1978, it was 52. The last fiscal year when grand jury presentations reached a rate comparable to the present rate was the 1976 fiscal year, when the Department sought indictments in 120 cases.

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[1] Remarks of William Bradford Reynolds, Assistant Attorney General, Civil Rights Division, before the Delaware Bar Association February 22, 1982, "Civil Rights Enforcement in the Reagan Administration: The First Year in Review." ("Reynolds Remarks") at p.6. The significance of the January 29, 1981 date is somewhat obscure and was, perhaps, an error since the Reagan administration took office on January 20, 1981 rather than January 29. In fact, between January 29, 1981 and February 22, 1982, 40 new cases had been filed; the remaining three cases cited by Reynolds were filed between January 20 and January 29, 1981.

[2] Id. at 6 (Emphasis in the original).

[3] Daniel F. Rinzel, Chief of the Criminal Section, April 5, 1982 interview. These figures are for the period October 1, 1981 through March 31, 1982. If indictments continue at the same rate for the remainder of the fiscal year, the section can expect to seek approximately 114 indictments during the fiscal year ending September 30, 1982. Except where noted and as more fully discussed below, all of these statistics include criminal civil rights cases brought by the various United States Attorneys offices or jointly prosecuted by a U.S. Attorney's office and the Criminal Section, as well as those prosecuted by the Criminal Section alone.

Traditionally, the most controversial and unpopular criminal section prosecutions are those brought against law enforcement officials. Yet these cases generally have been approved by Assistant Attorney General Reynolds. For example, in the last year the Section has brought cases against five INS officers at Ft. Chafee, Arkansas, who were charged with beating Cuban refugees. It has prosecuted a member of the Border Patrol for sexually molesting Mexican immigrants. It prosecuted the police chief in Tyler, Texas, for "setting up" defendants on drug charges and it has prosecuted a New Orleans homicide detective for brutality after a defendant died during interrogation.

The chief instance where Section attorneys were not permitted to take an action they had recommended occurred during the trial of the Fort Chafee - INS officials case. The Section attorney handling the case wanted to file a motion to limit impeachment of Cuban refugees testifying in the case by not permitting the use of their Cuban convictions -- either because they were "status" offenses or because the Cuban judicial system under which they were convicted lacked the due process necessary to ensure valid convictions. This position conflicted with that taken by the Department's Criminal Division, and Mr. Reynolds deferred to it on the issue. In the final analysis, however, it made little difference because the judge refused to allow the admission of the evidence in question.

It appears that there has also been general encouragement by the Department of prosecution of incidents of racial violence committed by private individuals -- particularly those involving suspected Ku Klux Klan activity or involuntary servitude. Associate Attorney General Rudolph Giuliani has met with lawyers from the Section to ask how the Department can assist in bringing involuntary servitude cases and to suggest new approaches to the issues that arise. It must be noted, however, that the Section has been prosecuting involuntary servitude cases for the last decade, and that it was during the Carter Administration that an "involuntary servitude coordinator" was appointed in the Section. During the past year these cases have received substantially more publicity than in prior years and are, therefore, more visible. In fact, there has not been any substantial increase in the number of such cases actually prosecuted.

During the Carter Administration a new strategy was devised in an attempt to remedy problems of widescale police abuse. Rather than relying on individual prosecutions after violations were committed, the Civil Rights Division attempted to initiate affirmative court actions in cities where problems were endemic, in hopes that city officials would take corrective measures. In 1979 the Criminal Section brought suit against the Philadelphia Police Department charging the existence of a pervasive pattern of police abuse that resulted in the denial of basic constitutional rights to all persons in Philadelphia. The suit also charged police department and city officials with facilitating the abusive practices by policies and procedures that hindered investigations of complaints and protected officers accused of wrongdoing from disciplinary actions. The District Court dismissed the action without reaching the merits, holding that there was no express or implied statutory authority for the Attorney General to bring such a suit. There is no indication that the current Administration intends to test its authority in other courts or to seek specific legislative authority for such actions. Indeed, resort to federal courts in this situation would seem to run directly counter to the Administration's "states' rights" policy.

The Administration has not yet had to confront two issues that could test its commitment to vigorous enforcement. The first is the so-called "dual prosecution" situation, where law enforcement officers are accused of acts that may violate both federal civil rights laws and state criminal law. In previous administrations the policy was to grant priority to the state prosecution unless there was some "compelling federal interest" in proceeding in a particular case. If the state declined to prosecute or prosecuted ineffectively, or if the officers were acquitted, the Civil Rights Division was then authorized to proceed. In view of the Administration's "states rights" philosophy, however, it remains to be seen whether such cases, particularly those with high visibility, will continue to be prosecuted at the federal level.

The second issue, somewhat related to the "dual prosecution" problem, involves conflicts between Civil Rights Division attorneys and local U.S. Attorneys. U.S. Attorneys are political appointees, whose views are, presumably consonant with the Administration's. Their decisions about which civil rights cases to prosecute in their locales may well be at fundamental odds with the views of the career lawyers in the Division. How those differences are resolved will be a telling factor in the Administration's ultimate record.

Despite speculation about what might happen in the future, statistically it does appear that the Justice Department is doing more civil rights enforcement in criminal cases than it did in the past. Statistics can, of course, be misleading and this Administration, not unlike others, may be manipulating numbers to make them say what the Administration wishes them to say. Attempts have apparently been made to re-characterize cases brought under the Carter Administration to make it appear that relatively fewer civil rights prosecutions were initiated during that time. On the other hand, many of the cases brought by U.S. Attorneys' offices which the current Administration includes in its total may include one or more counts under the civil rights statutes that are not necessarily true "civil rights" cases. Prosecutions of witness intimidation, for example, may have more to do with issues of criminal justice administration than with civil rights. To some extent, therefore, official statistics may be unreliable and it may be futile to try to compare statistics from one year to another. Nevertheless, there is general agreement among those individuals we interviewed that the Justice Department has initiated at least as many and perhaps more criminal rights prosecutions under the Reagan Administration than under previous administrations, and that, to date, there has been no overt attempt to interfere inappropriately with the work of the Criminal Section.

There are several explanations for this result. Preliminarily, it must be remembered that, unlike any other section in the Division, Criminal is reactive, not proactive. It responds to complaints, and depends upon the FBI to investigate the underlying allegations. Thus, as complaints increase and FBI field work in civil rights matters improves, the Section's level of activity is likely to achieve a corresponding increase. According to interviews with present and former Section officials, the current increase is attributable more to a combination of improved FBI work, random chance, and an increase in racial violence than to any initiative in the Section.

But there are also other reasons of policy behind the Criminal Section's relatively high level of activity. On a theoretical level, this Administration believes that widespread racism is a thing of the past. As a result, isolated intentional acts of discrimination are viewed as aberrations that deserve to be punished. As Assistant Attorney General Reynolds expressed it in his speech to the Delaware Bar Association:

> Our national consciousness has been raised, and the profound injustice of discrimination on the basis of immutable and irrelevant personal characteristics, such as color, is broadly recognized and condemned. As a consequence, racial and other stereotyping is declining, and most people now accept the legal and moral

> imperative to treat individuals equally, regardless of race, color[,] sex or national origin. Obviously, and sadly, there are exceptions, and enforcement action is still required. But it is most important, in my view, to appreciate that such circumstances are the exception and no longer the rule.[4]

Because the criminal cases present instances of purposeful, willful discriminatory actions, clearly motivated by racial considerations, they are, under Mr. Reynolds' view of modern race relations, clear examples of the exceptions, rather than the rule. In addition, the cases frequently involve acts of violence that no reasonable, morally upright person would publicly countenance.[5] Under the Administration's view, eradicating this kind of intentionally malicious and repugnant behavior will eliminate the problem of discrimination.

As a practical matter, these cases generally involve isolated actions by single individuals or small groups, and thus do not threaten any influential constituencies. If the Section were to attempt, for example, to bring peonage prosecutions against large landowners, or to try to prosecute police unions or to bring another affirmative *Philadelphia*-type suit, support for its activities could likely evaporate.

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[4] Reynolds remarks, at 5 (Emphasis added).

[5] At a meeting shortly after Reynolds came to the Justice Department, he and Deputy Attorney General Schmultz were shown videotaped evidence that was to be used in a case charging police officers with brutal mistreatment of an accused during questioning. According to others present, both Reynolds and Schmultz appeared disturbed by the police behavior depicted

Finally, the remedies sought in these cases are fully consistent with this Administration's philosophical view of the judiciary's role. They are "one-shot" prosecutions of alleged wrongdoers who are convicted and punished, or acquitted. They do not involve the courts or the Justice Department in the long-term supervision of the criminal justice system or any other institutions which, the current Division leadership believes, should be free from federal intrusion.

Given these circumstances, it is no surprise that Assistant Attorney General Reynolds has chosen to highlight the Criminal Section as the centerpiece of his civil rights activities. A recent report by the United States Commission on Civil Rights, however, provides a disturbing warning. The Commission reported in June, 1982 that the Section faces "growing problems in existing areas of its jurisdiction," including "increased Ku Klux Klan activity," and "widespread violations it believes certain groups are suffering," which it has not had the resources to investigate.[6] Nevertheless, the Justice Department's proposed Fiscal Year 1983 budget would cut the staff and other resources available to the Criminal Section, preventing it from making "a major effort against these violations in FY 1983."[7]

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[6] United States Commission on Civil Rights, The Federal Civil Rights Enforcement Budget: Fiscal Year 1983 (June, 1982) at 30 n.88 and 36. These widespread problems include harassment and discrimination against Hispanics in the Southwest and Far West and migrant workers subject to illegal peonage.

[7] *Id.* at 36-37.

Senator Mathias. Thank you very much.

STATEMENT OF LAURA D. BLACKBURNE

Ms. Blackburne. Senator Mathias, and members of the committee in absentia, I am Laura Blackburne, counsel for the New York State Conference of Branches of the National Association for the Advancement of Colored People. I am presenting testimony today here on behalf of the 77 units of NAACP in New York State, including sixteen branches located in State correctional facilities. We have a deep concern for justice and a particular interest in the U.S. Department of Justice, so I appreciate this opportunity to express the views of the 30,000 New York State NAACP members on the proposed elevation of William Bradford Reynolds.

We most ardently and vigorously oppose his elevation and urge you to vote "no" on his confirmation.

Mr. Reynolds has amply demonstrated that he is patently unfit for this serious responsibility.

I must also point out that he has shown contempt for this process here today by his absence from this portion of the hearings. We sat through his testimony yesterday and this morning, and he could care less what we have to say about his nomination for this most serious job. And I personally resent that.

Over the past few years, as Director of the Civil Rights Division, Mr. Reynolds has systematically perverted the mission of his office as well as acted in direct contradiction of professional ethics of the legal profession, and, most important, he has flagrantly disregarded the Constitution and laws he was sworn to uphold.

To elevate such a man is to dishonor the Justice Department, the legal profession, and all of the people of these United States. And particularly as a New Yorker, Mr. Reynolds' confirmation poses a serious threat to the lives of New Yorkers—and I will elaborate on that particular point in just a moment.

The Justice Department has traditionally been a bulwark for blacks against injustice, and a barricade of protection for hard-won rights. Indeed, the Justice Department has played a major role in aggressively securing precious civil rights where local officials balked or blocked blacks in the exercise of their rights.

Up until 1980 New Yorkers were direct beneficiaries of this traditional responsibility. Local governments in New York State were sued by the Justice Department to overcome racially discriminatory public employment, housing, education, and voting practices in Buffalo, Hempstead, Yonkers, and New York City, just to mention a few of the locations.

The Justice Department was especially supportive and protective of civil rights advocacy groups in monitoring marches and demonstrations in behalf of civil rights.

And it is important to note that this activist role assigned to the Justice Department was legislated by Congress in the various civil rights statutes. And this was done in recognition of the inability and unwillingness of local law enforcement officials to ensure the equal protection of the law to all of its citizens. This was true in New York just as it was and still is in other States across the country.

There has been great progress since the end of slavery, but the legacy of those 350 years of injustice to black Americans has not been overcome. nor adequately redressed, in the short 31 years since the end of legal discrimination and segregation. There is a need still for the special mission of the Federal Government to see that equal treatment under the law becomes a reality for black New Yorkers, and that is the Justice Department's duty.

It was against this background that I had a personal encounter with Mr. Bradford Reynolds. Two years ago this very month a group of black community leaders and clergy came to Washington to visit with Mr. Reynolds to request his help with a very serious problem that we were enduring at that point—and that is the whole problem of racially motivated police brutality and abuse by other law enforcement officials in New York against blacks.

We had come because local officials were doing nothing about the problem. We brought with us dozens—not one, not two, not three, but dozens of active files of individuals who had suffered serious brutality at the hands of white police officers, and we asked Mr. Reynolds to help us with this.

We also told him about the racial makeup of the New York City police department, which reflected a minuscule number of blacks and other minorities in the whole of the police force. And we had police officers with us who told about their own personal experiences of racially motivated abuse by other white police officers.

His answer—and I quote him, and I will read you from my statement—he said to us: "You have made an impression on me with your presentation. I am concerned and disturbed, and intend to pursue your request."

And we left feeling hopeful. To this very day, Senator Mathias, we have not had a response from Mr. Reynolds to our request. Instead we read in the papers a few days, a few weeks, after that visit that he had found no evidence of racially motivated police brutality or any particular brutality in New York.

The New York State NAACP believes that Mr. Reynolds, had he acted upon the information that we brought to him that day, that Michael Stewart, a young black artist, would still be alive instead of beaten to death by white police officers 3 months after we visited with Mr. Reynolds, and that Eleanor Bumpers, a sick 67-year-old black grandmother, would not have been killed by police officers.

Following our visit to Mr. Reynolds, the number of incidents of racially motivated police violence in New York City reached an alarming level and finally convinced the local officials to do something after the stun-gun torture cases of a few weeks ago. Had Mr. Reynolds taken his duty seriously so much suffering might have been prevented. Instead he was busy flouting the constitutionally mandated separation of powers, spending his time attempting to usurp Congress' role in enacting laws, and to become a super supreme court overruling well-settled legal precedent.

Senator **Mathias**. Ms. Blackburne——

Ms. **Blackburne**. I have a summation statement, if I may.

Senator **Mathias**. Because I want to keep some time for questions.

Ms. **Blackburne**. All right.

Senator **Mathias**. And I have extended the time.

Ms. BLACKBURNE. Thank you for that consideration.

Mr. Reynolds affronts every American who believes in a nation of laws and not of men, and it is for that reason, as a black woman, as a lawyer, as a law professor, that I most vigorously oppose his confirmation, and I challenge this committee, if they are truly interested in protecting and preserving our Nation, that they would protect it from Mr. Reynolds' form of treason.

Thank you.

[The following was received for the record:]

TESTIMONY
OF
LARUA D. BLACKBURNE, COUNSEL
NEW YORK STATE CONFERENCE OF BRANCHES
OF THE
NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE

MR. CHAIRMAN AND COMMITTEE MEMBERS, I AM LAURA D. BLACKBURNE, COUNSEL TO THE NEW YORK STATE CONFERENCE OF BRANCHES OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE. I AM PRESENTING TESTIMONY TODAY ON BEHALF OF THE 77 UNITS OF N.A.A.C.P. IN NEW YORK STATE, INCLUDING THE 16 BRANCHES LOCATED IN STATE CORRECTION FACILITIES. WE HAVE A DEEP CONCERN FOR JUSTICE ANDA PARTICULAR INTEREST IN THE UNITED STATES DEPARTMENT OF JUSTICE SO I VERY MUCH APPRECIATE THIS OPPORTUNITY TO EXPRESS THE SPECIAL VIEWS OF OUR NEW YORK STATE N.A.A.C.P. MEMBERS ON THE PROPOSED ELEVATION OF WILLIAM BRADFORD REYNOLDS.

WE MOST ARDENTLY AND VIGOROUSLY OPPOSE HIS ELEVATION AND URGE YOU TO VOTE "NO" ON MR. REYNOLDS CONFIRMATION.

WE BELIEVE THAT YOU MUST VOTE AGAINST MR. REYNOLDS BECAUSE HE AMPLY DEMONSTRATED THAT HE IS UNFIT TO DISCHARGE THE SERIOUS RESPONSIBILITIES OF THIS MOST IMPORTANT POSITION.

OVER THE PAST FEW YEARS AS DIRECTOR OF THE CIVIL RIGHTS DIVISION OF THE JUSTICE DEPARTMENT HE HAS SYSTEMATICALLY PERVERTED THE MISSION OF HIS OFFICE AS WELL AS ACTED IN DIRECT CONTRADICTION OF THE PROFESSIONAL ETHICS OF THE LEGAL PROFESSION AND MOST IMPORTANT, HE FLAGRANTLY

DISREGARDED THE CONSTITUTION AND LAWS HE WAS SWORN TO UPHELD.

TO ELEVATE SUCH A MAN IS TO DISHONOR THE JUSTICE DEPARTMENT, THE LEGAL PROFESSION AND ALL OF THE PEOPLE OF AMERICA. MORE IMPORTANTLY, TO VOTE IN FAVOR OF MR. REYNOLDS' CONFIRMATION MAY VERY WELL JEOPARDIZE THE LIVES OF BLACK NEW YORKERS.

BEFORE I ELABORATE MORE ON THAT LAST POINT LET ME SHARE WITH YOU THE HISTORICAL IMPORTANCE OF THIS APPOINTMENT TO BLACK AMERICANS.

SINCE THE CIVIL RIGHTS ACT OF 1964 AND THE VOTING RIGHTS ACT OF 1965 THE JUSTICE DEPARTMENT HAD TRULY BEEN A BULWARK AGAINST INJUSTICE FOR BLACKS, AND A BARRICADE OF PROTECTION FOR THESE HARD WON RIGHTS. INDEED, THE JUSTICE DEPARTMENT HAD PLAYED A MAJOR ROLE IN AGRESSIVELY SECURING THESE PRECIOUS RIGHTS WHERE LOCAL OFFICIALS BALKED OR BLOCKED BLACKS IN THE EXERCISE OF THESE RIGHTS.

NEW YORKERS WERE DIRECT BENEFICIARIES OF THIS TRADITIONAL RESPONSIBILITY OF THE JUSTICE DEPARTMENT. THROUGH THIS SPECIAL RELATIONSHIP LOCAL GOVERNMENTS IN NEW YORK STATE STATE WERE SUED BY THE JUSTICE DEPARTMENT TO OVERCOME DISCRIMNATORY PUBLIC EMPLOYMENT, HOUSING, EDUCATION AND VOTING PRACTICES IN BUFFALO, HEMPSTEAD, YONKERS, AND NEW YORK CITY, TO MENTION A FEW. ADDITIONALLY, THE JUSTICE DEPARTMENT WAS ESPECIALLY SUPPORTIVE AND PROTECTIVE OF CIVIL RIGHTS ADVOCACY GROUPS IN HUNDREDS OF PUBLIC DEMOSTRATIONS BY SENDING IN MARSHALS TO MONITOR CROWDS AND GENERALLY FACILITATE SAFE ORDERLY CIVIL RIGHTS MARCHES AND DEMONSTRATIONS.

IT IS IMPORTANT TO NOTE THAT THIS ACTIVE PARTNERSHIP OF JUSTICE DEPARTMENT OFFICIALS WITH LOCAL CIVIL RIGHTS ADVOCATES WAS WRITTEN INTO THE FEDERAL CIVIL RIGHTS LAWS. THIS WAS IN RECOGNITION OF THE INABILITY AND UNWILLINGNESS OF LOCAL LAW ENFORCEMENT OFFICIALS TO INSURE THE EQUAL PROTECTION OF THE LAW TO ALL ITS CITIZENS. THIS WAS TRUE IN NEW YORK AS WELL AS OTHER STATES, AND IT IS JUST AS TRUE TODAY

AS IT WAS IN THE PAST. CLEARLY GREAT PROGRESS HAS BEEN MADE FROM THE TIME OF SLAVERY; TO YEARS OF LEGALLY SANCTIONED SEGREGATION AND INEQUALITY; TO THE ERA OF THE REMOVAL OF DISCRIMINATORY LAWS; TO THE RECENT DAYS OF AFFIRMATIVE IMPLEMENTATION OF EQUAL RUGHTS. BUT THE LEGACY OF OVER 350 YEARS OF INJUSTICE TO BLACK AMERCIANS HAS NOT YET BEEN FULLY OVERCOME AND ADEQUATELY REDRESSED IN THE 31 YEARS SINCE LEGAL SEGREGATION WAS FINALLY ENDED. THERE IS STILL A NEED FOR THE SPECIAL MISSION OF THE FEDERAL GOVERNMENT TO SEE THAT EQUAL TREATMENT UNDER THE LAW BECOMES A REALITY FOR BLACK NEW YORKERS. THIS DUTY FALLS TO THE JUSTICE DEPARTMENT AND CONGRESS HAS SO LEGISLATED THAT ROLE SPECIFICALLY IN THE CIVIL RIGHTS LAWS AND THE VOTING RIGHTS ACT, WHICH THEY RECENTLY EXTENDED.

IT WAS AGAINST THIS BACKGROUND THAT 2 YEARS AGO THIS MONTH THAT I ALONG WITH A DELEGATION OF CLERGY AND COMMUNITY LEADERS, FROM NEW YORK WENT TO MR. REYNOLDS OFFICE AS HEAD OF THE CIVIL RIGHTS DIVISION OF THE JUSTICE DEPARTMENT.

WE HAD COME TO WASHINGTON TO SEEK FEDERAL INTERVENTION AND ASSISTANCE WITH THE SERIOUS PROBLEM OF AN ALARMING INCREASE IN THE INCIDENTS OF RACIALLY MOTIVATED POLICE BRUTALITY AND ABUSE OF BLACK NEW YORKERS.

WE BROUGHT DOZENS OF ACTIVE CASE FILES WITH DOCUMENTATION AND AFFIDAVITS OF EGREGIOUS EXAMPLES OF PLICE MUSCONDUCT AGAINST CITIZENS. WE ALSO BROUGHT BLACK POLICE OFFICERS WHO TOLD MR. REYNOLDS OF THE ABUSE THEY WERE SUBJECTED TO BY WHITE POLICE OFFICERS. WE PRESENTED

HIM WITH THE SHOCKING STATISTICS OF THE RACIAL MAKE UP OF THE NEW YORK CITY POLICE DEPARTMENT WHERE FEWER THAN 8% OF THE 26,000 OFFICERS ON THE FORCE WERE BLACK IN CITY WHERE BLACKS WERE MORE THAN 35% OF THE POPULATION. WE TOLD HIM OF THE ROUTINE PRACTICE OF FINDING BLACK CANDIDATES WHO PASSED THE TESTS TO BE "PSYCHOLOGICALLY" UNQUALIFIED TO GO ON TO TRAIN IN THE ACADEMY. MR. REYNOLDS AND HIS ALL WHITE STAFF LISTENED TO US POLITELY AND SAID, AND I QUOTE HIM: "YOU HAVE MADE AN IMPRESSION ON ME WITH YOUR PRESENTATION". HE CONTINUED BY SAYING "I AM CONCERNED AND DISTURBED AND INTEND TO PURSUE YOUR REQUEST FURTHER".

WE LEFT HIS OFFICE FEELING HOPEFUL THAT HELP WAS FORTHCOMING. SPECIFICALLY, HE WOULD HAVE HIS STAFF MONITOR THE CONGRESSIONAL HEARINGS ON POLICE VIOLENCE SCHEDULED THE FOLLOWING MONTH. HE WOULD ALSO HAVE THE CASES THAT WE PRESENTED TO HIM INVESTIGATED.

TO THIS DAY, NO ONE FROM MR. REYNOLDS' OFFICE HAS SAID A "MUMBLING" WORK TO ANY OF THAT DELEGATION. HOWEVER, AFTER CALLING HIS OFFICE FOR A STATUS REPORT WE READ IN THE PAPERS A FEW WEEKS LATER A STATEMENT RELEASED BY MR. REYNOLDS THAT HE SAW NO EVIDENCE OF POLICE BRUTALITY, RACIALLY MOTIVATED OR OTHERWISE. THERE WAS NO MENTION OF THE BASIS UPON WHICH HIS CONCLUSION WAS FOUNDED.

WE IN THE NEW YORK STATE N.A.A.C.P BELIEVE THAT HAD MR. REYNOLDS ACTED UPON THE INFORMATION WHICH WE PROVIDED THAT DAY; THAT IF HE HAD MADE USE OF THE VAST FEDERAL RESOURCES AVAILABLE TO HIM; THEN, LAW ENFORCEMENT OFFICIALS IN NEW YORK WOULD HAVE BEEN FORCED TO DO 2 YEARS AGO WHAT THEY ARE JUST NOW BEGINNING TO DO. AND, MICHAEL STEWART A YOUNG BLACK ARTIST

MIGHT STILL BE ALIVE INSTEAD OF BEATEN TO DEATH BY WHITE POLICE OFFICERS 3 MONTHS AFTER OUR MEETING WITH MR. REYNOLDS. AND ELEANOR BUMPERS A SICK 67 YEAR OLD BLACK GRANDMOTHER MIGHT NOT BE DEAD HAVING BEEN BLASTED APART BY A SHOTGUN FIRED BY A WHITE POLICE OFFICER MONTHS AFTER OUR VISIT TO MR. REYNOLDS.

MICHAEL STEWART'S "CRIME" WAS SPRAYING PAINT ON A SUBWAY STATION WALL AND HIS SENTENCE WAS DEATH BY BEATING. ELEANOR BUMPERS' "CRIME" WAS FAILURE TO PAY 2 MONTHS RENT AND HER SENTENCE WAS DEATH BY SHOTGUN BLAST.

IN THE LAST FEW MONTHS, A YEAR AND HALF, SINCE OUR VISIT TO MR. REYNOLDS THE BOLDNESS OF ACTS OF RACIALLY MOTIVATED POLICE BRUTALITY IN NEW YORK HAVE SHOCKED THE PUBLIC CONSCIOUS WHEN THE STUN-GUN TORTURE INCIDENTS BECAME PUBLIC. NOW LOCAL OFFICIALS ARE ACKNOWLEDGING THE NEED TO TAKE A LOOK AT THE PROBLEM BECAUSE CIVILIAN COMPLAINTS OF POLICE MISCONDUCT HAVE INCREASED BY NEARLY 40% OVER 2 YEARS.

IF ONLY MR. REYNOLDS HAD TAKEN HIS DUTIES SERIOUSLY 2 YEARS AGO HOW MUCH SUFFERING COULD HE HAVE PREVENTED?

INSTEAD, HE HAS BEEN BUSY FLOUTING THE CONSTITUTIONALLY MANDATED SEPARATION OF POWERS BY SPENDING HIS TIME ATTEMPTING TO USURP CONGRESS' ROLE AND ENACT NEW LAWS IN CIVIL RIGHTS. HE HAS TRIED TO BECOME A SUPER-SUPREME COURT AND OVER RULE WELL SETTLED LEGAL PRECEDENTS AND THROW OUT DECREES ORDERING REMEDIES FOR PAST CIVIL RIGHTS VIOLATIONS.

MR. REYNOLDS HAD NOTICE OF A SERIOUS AND CONTINUING INJURY TO SCORES OF CITIZENS IN NEW YORK. INDEED, HE HAD CLEAR AND COMPELLING EVIDENCE OF THOSE INJURIES COMMITTED AT THE HANDS OF POLICE. HE HAD THE AUTHORITY, JURISDICTION AND RESOURCES TO REDRESS THOSE WRONGS AND TO PREVENT FUTURE INJURIES OF A SIMILAR NATURE. HE ASSUMED THE DUTY TO INTERVENE.

BUT MR. REYNOLDS FAILED TO DISCHARGE HIS RESPONSIBILITIES TO INVESTIGATE AND TO ACT WITH DUE CARE AND DILIGENCE. THIS WAS A GRIEVOUS BREACH OF DUTY WHICH RESULTED IN SERIOUS INJURY. THEREFORE, WE HOLD HIM RESPONSIBLE FOR THE PAIN AND SUFFERING OF ALL THE SCORES OF VICTIMS OF POLICE MISCONDUCT AND BRUTALITY THAT HAVE OCCURRED IN NEW YORK SINCE JUNE 1983.

SUCH A MAN AS THIS IS A CLEAR AND PRESENT DANGER TO OUR CONSTITUTION AND DEMOCRATIC PRINCIPLES. TODAY HIS PRIMARY TARGET IS BLACK AMERICANS. IF HE IS PERMITTED TO CONTINUE IN ANY POSITION OF AUTHORITY, WITH JURISDICTION OR WITHOUT, HE WILL SWEEP EVERYONE WITHIN THIS DESTRUCTIVE AMBIT.

AS A BLACK AMERICAN AND AS A LAWYER I TAKE PRIDE AND COMFORT FROM THE KNOWLEDGE THAT THIS IS A NATION OF LAWS, NOT MEN. WHEN THAT CHANGES BECAUSE OF MISPLACED POLITICAL ZEAL OR BLIND LOYALTY, OR WORSE, UNCHECKED AMBITION THEN FREEDOM AND JUSTICE ARE LOST. THE JUSTICE DEPARTMENT OF THE UNITED STATES MUST BE LED BY POLICY MAKERS WHO RESPECT THE CONSTITUTION, WHO UNDERSTAND THEIR DUTY TO ENFORCE THE LAWS MADE BY CONGRESS AND THE COURTS. ABOVE ALL, THE LEADERS OF THE JUSTICE

DEPARTMENT MUST HAVE A HIGHLY DEVELOPED SET OF ETHICS AS WELL AS LEGAL SKILLS; AND, THE WILL TO USE THEM TO ENSURE EQUAL PROTECTION OF THE LAWS FOR ALL AMERICANS, INCLUDING BLACK NEW YORKERS.

WE DO NOT BELIEVE THAT WILLIAM BRADFORD REYNOLDS CAN OR WILL BE SUCH A LEADER. ON BEHALF OF THE NEW YORK STATE N.A.A.C.P. I ASK YOU TO CONSIDER WHETHER OR NOT YOU PERSONALLY WANT TO ASSUME ANY RESPONSIBILITY FOR THE CONTINUED AND FURTHER DESTRUCTION OF AMERICAN CONSTITUTIONAL DEMOCRACY. BY VOTING AGAINST MR. REYNOLDS' CONFIRMATION YOU WILL FOLLOW IN THE HIGHEST TRADITION OF AMERICANS COMMITTED TO PRESERVE AND PROTECT OUR NATION.

IN THE NAME OF JUSTICE WE URGE YOU TO VOTE "NO" ON MR. REYNOLDS CONFIRMATION.

THANK YOU.

Senator **Mathias**. Thank you, Ms. Blackburne. Mr. Hampton?

STATEMENT OF RONALD E. HAMPTON

Mr. **Hampton**. Thank you, Mr. Chairman. My name is Ronald Hampton, and I am the national chairman of the National Black Police Association that represents 30,000-some black police officers all over this country.

As chairman of the National Black Police Association, I am here to testify against the nomination of Mr. Bradford Reynolds for the position of Associate Attorney General of the United States. The Civil Rights Division under Mr. Reynolds' anti-civil-rights record is too consistent, too comprehensive, too well thought out to be a policy accident or a series of misstatements or miscalculations.

Our primary concern about Mr. Reynolds' nomination stems from his disregard of the law in remedying employment discrimination against blacks and other minorities and women. His disregard of the law is not limited to the context of employment discrimination, but has opposed the interest of black people in this country in virtually every area of civil rights.

The example being set by Mr. Reynolds is, in our opinion, a bad one for law enforcement. As a law enforcement officer myself, we are taught to believe that it is a sworn duty to enforce and follow the rule of the law regardless of the fact that we personally disagree with it or not.

Police departments a decade ago were the most discriminatory of all employers—and that is still true today. Discrimination occurs in all major aspects of police employment, recruitment, selection criteria, hiring, training, assignments, benefits, promotions, disciplinary action, discharge, and so on.

In the city of Pompano Beach, FL, the consent decree is 9 years old, and it appears to have never been enforced to this day. There are no black officers above the rank of patrol; in fact, there has been no monitoring of the decree in 7 years. Last year Justice Department attorneys visited the city for the first time in 7 years, and found the city in violation of the consent decree, especially in the police department. The independent management consultant accused the police department of an abysmal affirmative action program.

The lawsuit against the Buffalo Police Department is now 12 years old, yet little has been changed. Racial discrimination continues to permeate job assignments: 3 out of 14 precincts are still staffed only by white officers; no black officers are assigned to the narcotics division; no black officers assigned to homicide; none of the 55 detectives is black; none of the 175 sergeants is black; only 1 of the 103 lieutenants is black; and only 1 of the 25 captains is black.

In the Florida highway patrol, despite the Civil Rights Division's 6-year-old consent decree, only two black corporals and one black in any higher rank.

Recently, in Cleveland, the city of Cleveland for 7 years was under a consent decree. The consent decree recently, in January of this year, expired. In the last 3 or 4 years of the consent decree, the city of Cleveland held back the promotional test until after the consent decree expired. They held the promotional examinations February 5. The results of the promotional examination were: out of two-thirds of the police department that tested was eligible for promotion, only 1 black was promoted—will be promoted to the rank of sergeant, and 1 black promoted to the rank of lieutenant—and that is out of 175 in each category.

There are other horror stories. As police officers, we are bound to enforce the rules and laws of the land, and yet Mr. Reynolds tends to circumvent those laws to the point of his own personal beliefs.

As police officers, we have been experiencing the same kind of problems. I would like to speak to some of the examples that the sister used in the State of New York. Our police organization had participated in assisting Congressman Conyers to come to the city to make or handle these hearings in setting up to hear this testimony. And they had been victims of harassment by their own police department in offering this assistance to the complainants and the people wanting to testify. And it's not just going on in New York City; it's going on all over the country.

A major portion of our organization is involved in some type of negotiation or litigation in court now at the present, and in polling our organizations we all have the same feeling that we are against the confirmation of the nomination of Mr. Bradford Reynolds as Associate Attorney General.

Thank you.

[The following was received for the record:]

Prepared Statement of
Ronald E. Hampton and
Jimmy Hargrove

On Behalf of the
National Black Police Association

Thank you, at the outset, for providing us with the opportunity to present the views of the National Black Police Association on the nomination of William Bradford Reynolds as Associate Attorney General. For the reasons expressed herein -- focusing primarily on Mr. Reynold's disregard of the law -- we believe that Mr. Reynolds is not qualified for promotion, and we urge that his nomination not be confirmed.

In this Statement, we briefly address: (1) the background and objectives of the National Black Police Association; (2) the general disregard of the law evidenced by Mr. Reynolds; and (3) the specific disregard of the law by Mr. Reynolds in remedying employment discrimination.

1. The National Black Police Association

Black police officers, finding themselves very definitely in the minority both in color and in discriminatory treatment within their law enforcement agencies, began years ago to form their own black police organizations for purposes of expression and protection.

In 1972, eleven of these local organizations joined together to form the National Black Police Association ["NBPA"]. More than a decade later, the NBPA now has 97 member associations representing some 35,000 black police officers throughout the United States.

The NBPA was established, and continues to be dedicated, to the rule of law and to effective law enforcement. Many of the NBPA's programs and efforts are specifically designed:

- to improve the relationship between police departments, as institutions, and the black community;
- to evaluate the effects, of the policies and programs within the criminal justice system, on the Black Community;

- to act as a mechanism to recruit minority police officers on a national scale; and
- to work toward police reform in order to eliminate police corruption, brutality, and racial discrimination.

The NBPA's goal of eliminating discrimination from law enforcement extends not only to discrimination on grounds of race, color and national origin but also to sex discrimination. As a matter of policy, the NBPA opposes discrimination against female applicants for employment as police officers, opposes discrimination against female police officers, and firmly believes that women police officers are an untapped resource vital to the effective survival of our nation's police departments.

Although the elimination of discrimination from law enforcement is only one of the NBPA's overall objectives, employment discrimination is certainly the major problem consistently encountered by minority and female police officers personally in their daily work. Police departments, a decade ago, were the most discriminatory of all employers. That is still true today. The discrimination often occurs in some or all of the major aspects of police employment: recruitment, selection criteria, hiring, training, assignment, benefits, promotion, disciplinary action, discharge, and so on.

We have not reacted to this discrimination quietly. Often at considerable risk, virtually all of our member organizations and many of their individual members have filed written charges of discrimination against their own law enforcement agencies with state and local human rights commissions, with the EEOC, with the LEAA, and with the ORS. Ironically -- with regard to the climate in the Civil Rights Division today -- many of these charges were ultimately referred to the Civil Rights Division of the Justice Department, which, in the 1970s, filed and won a considerable number of lawsuits against state and local law enforcement agencies. More often, however, our local member organizations and their individual members had to incur considerable expense by filing and winning their own lawsuits.

At the national level, the NBPA has repeatedly sought effective law enforcement by the federal government as mandated by Congress. When the law was being violated, we have testified before Congress in an effort to explain those violations, as we did with regard to the LEAA in hearings held in 1976 by the House Subcommittee on Crime, and as we did with regard to the ORS in hearings held in 1982 by the House Subcommittee on Civil and Constitutional Rights. When the law was being violated, we have on occasion sued the violators, as we did in our civil rights enforcement lawsuit against the Justice Department and its officials, National Black Police Association v. Velde, 631 F.2d 784 (D.C. Cir. 1980), vacated and remanded, 458 U.S. 591 (1982), on remand, 712 F.2d 569 (D.C. Cir. 1983), cert. denied, ___ U.S. ___ (1984). And when the law was being violated, we have constantly met with top federal officials to explain the importance of effective law enforcement, as we did throughout the 1970s in meetings with the top officials of the Civil Rights Division, the EEOC, the LEAA, and the ORS, and as we did only six weeks ago in a meeting with William Bradford Reynolds and five of his assistants.

The NBPA, its member organizations, and their individual members have, in sum, been in the forefront of the law enforcement effort to eliminate and to remedy illegal discrimination against blacks, other minorities, and women. In pursuit of this objective, we have followed the rule of law; we have only asked that the laws as written be enforced in fact.

As current and former law enforcement officers ourselves, much less as representatives of law enforcement officers across the county who are seeking to improve law enforcement in this nation, we are not very appreciative of those who would threaten our lives, those who would threaten our livelihoods, or those who would threaten our civil rights.

To be sure, in the past dozen years we have had numerous confrontations with federal officials about the proper enforcement of our civil rights laws. But these disagreements, for the most part, have been procedural, not substantive. Not so with William Bradford Reynolds. Never before have our nation's minorities and women been confronted with an Assistant Attorney General for Civil Rights whose words and actions have consistently been in opposition not only to the attainment of equality, but also to the rule of law.

2. Mr. Reynolds' General Disregard of the Law

Although our primary concern about Mr. Reynolds' nomination stems from his disregard of the law in remedying employment discrimination against blacks, other minorities and women, see infra at 9-14, it is apparent that Mr. Reynolds' disregard of the law is not limited to the context of employment discrimination. Instead, Mr. Reynolds' Civil Rights Division has opposed the interests of the black people in this country in virtually every area of civil rights.

This broad disregard of the law in general and of black people in particular is set forth before this Committee in the Statement of Thomas D. Barr on behalf of members of the Board of Trustees of the Lawyers' Committee for Civil Rights Under Law.[1] We will not repeat here the numerous examples set forth in that excellent Statement. Nevertheless, two examples deserve particular emphasis as illustrations of Mr. Reynolds' disregard of the law.

The first example concerns the Justice Department's altered position in support of granting tax-exempt status to racially discriminatory private schools, an altered policy position taken during the briefing of Bob Jones University v. United States, 461 U.S. 574 (1983). When Mr. Reynolds asserted that his new federal support for private discrimination was the "absolutely correct legal decision," Washington Post (Feb. 17, 1982), he pointedly refused to recognize the fact that his position violated § 501(c)(3) of the Internal Revenue Code as judicially construed in Green v. Connally, 330 F. Supp. 1150 (D.D.C. 1971) (three-judge court), aff'd mem. sub nom. Coit v. Green, 404 U.S. 997 (1971); refused to recognize the fact that his position was inconsistent with the public policy against federal support of private discrimination as set forth in Title VI of the Civil Rights Act of 1964; and refused to recognize the fact that his position was contrary to the government's "constitutional obligation . . . to steer clear . . . of giving significant aid to institutions that practice racial or other invidious discrimination," Norwood v. Harrison, 413 U.S. 455, 467 (1973); see also Cooper v. Aaron, 358 U.S. 1, 19 (1958) ("support of segregated schools through any arrangement, management, funds or property cannot be squared with" the Constitution). In any event, as the Supreme Court ultimately ruled in Bob Jones University v. United States, 461 U.S. 574, 594 (1983), Mr. Reynolds' proposed support of racially discriminatory private schools was hardly absolutely correct since it unquestionably would "violate a fundamental public policy."

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[1] See also the following reports on the anti civil rights activities of the Civil Rights Division: Leadership Conference on Civil Rights, Without Justice: A Report on the Conduct of the Justice Department in Civil Rights (February, 1982); American Civil Liberties Union, In Contempt of Congress and the Courts: The Reagan Civil Rights Records (February, 1984).

The second example concerns the altered position taken six months earlier by the Justice Department in another education case, Washington v. Seattle School District No. 1, 458 U.S. 457 (1982). In this case, in which the plaintiffs challenged the constitutionality of a state statute which would have barred Seattle and other local school districts from continuing their voluntarily adopted school desegregation programs, the Justice Department intervened as a plaintiff similarly arguing that the state statute violated the Fourteenth Amendment. Following the plaintiffs' lower court victories, Seattle School District No. 1 v. Washington, 633 F.2d 1338 (9th Cir. 1980), aff'g 473 F. Supp. 996 (W.D. Wash. 1979), and subsequent to Mr. Reynolds' confirmation as Assistant Attorney General, the Justice Department switched sides, urged the Supreme Court to grant certiorari, and urged the Supreme Court to reverse the plaintiffs' and the Justice Department's own lower court victories. In his ideological haste to oppose school desegregation -- even voluntary desegregation as undertaken in Seattle -- Mr. Reynolds disregarded not only the law but professional ethics as well. Irrelevant to Mr. Reynolds was the fact that the Justice Department's intervention was sought and granted under 42 U.S.C. § 2000h-2, a federal statute which purports to authorize intervention by the United States only as a plaintiff. Also irrelevant to Mr. Reynolds was the fact that Canons Four and Nine of the Code of Professional Responsibility purport to bar all lawyers from gaining co-counsel access to one side's legal strategy and work product and thereafter switching sides in the same case.

In neither of these cases, however, nor in many of the other cases cited to this Committee, was Mr. Reynolds guided by fairness, ethics, legal analysis, or even the rule of law. Instead, as far as we are aware, he has usually pursued ideological ends which trammeled the interests of blacks, other racial minorities, and women.

The example being set by Mr. Reynolds is an ominous one for law enforcement. As law enforcement officers ourselves, we are taught and we believe that it is our sworn duty to enforce and to follow the rule of law regardless of the fact that we may personally disagree with it. For example, individual members of our organizations have followed the rule of law by arresting prominent citizens and civil rights activists activists engaged in illegal demonstrations against apartheid, and others have followed the rule of law by protecting members of the Ku Klux Klan at authorized demonstrations.

Mr. Reynolds too is sworn to uphold the rule of law. His refusal to do so in pursuit of personal ends does not qualify him to be a police officer, much less one of the top law enforcement officials in our nation.

3. Mr. Reynolds' Specific Disregard of the Law in Remedying Employment Discrimination.

From the outset of his tenure as Assistant Attorney General for Civil Rights, Mr. Reynolds has firmly opposed affirmative action goals and timetables in any form, whether voluntarily adopted, or court ordered to remedy the effects of pervasive past discrimination against minorities and women. In pursuit of his ideological campaign, Mr. Reynolds again has lost sight of the law.

As to voluntarily adopted goals and timetables, not relevant to Mr. Reynolds is the Supreme Court's decision in United Steelworkers v. Weber, 443 U.S. 193 (1979), upholding voluntarily adopted goals and timetables. In Mr. Reynolds' words: "My own view is that Weber was wrongly decided." Wall Street Journal (Dec. 8, 1981).

As to court ordered affirmative action goals and timetables to remedy the effects of past discrimination, not relevant to Mr. Reynolds is the Supreme Court's decision in Regents of the University of California v. Bakke, 438 U.S. 265 (1978), where a majority of the Court approved such remedies. Also irrelevant is the fact that, "[e]very federal Court of Appeals in this nation has approved remedial use of goals and timetables without requiring that each and every potentially eligible person be shown to have been a victim of discrimination." Segar v. Smith, 738 F.2d 1249, 1293 (D.C. Cir. 1984) (footnote citing cases omitted). Instead, in Mr. Reynolds' words, these judicially approved and effective remedies are somehow "unsound as a matter of law and unwise as a matter of policy." See Testimony of Mr. Reynolds before the House Subcommittee on Employment Opportunities (Sept. 23, 1981).

Disregarding controlling law, Mr. Reynolds' Civil Rights Division initiated his assault on affirmative action four years ago primarily by filing amicus briefs or by intervening in pending cases involving affirmative action goals and timetables. These efforts to dismantle affirmative action were, however, repeatedly rejected by the federal courts.

Six months ago, Mr. Reynolds and his Civil Rights Division embarked on a new strategy to undo affirmative action. They first reviewed some 51 lawsuits in which the Justice Department during the 1970s had sued state and local governments (usually police and/or fire departments) for discrimination and had obtained consent decrees requiring affirmative action hiring of racial minorities and women. They then proposed in all 51 cases that the defendant state or local governments join the Justice Department in filing joint motions to eliminate all affirmative action provisions from the consent decrees. Mr. Reynolds in other words, not only was seeking to eliminate affirmative action, but he was trying to do so behind closed doors without public notice.

No doubt much to his surprise, most of the 51 defendant governments have refused to go along with Mr. Reynolds' clandestine proposals. From Jackson to Milwaukee, from Los Angeles to New York State, most of the 51 defendant governments firmly responded to Mr. Reynolds that their affirmative action plans have been effective, they continue to be necessary, and they are legal.

Apart from the obviously anti civil rights nature of this recent campaign by Mr. Reynolds, there are two aspects to the assault which are particularly noteworthy. First, Mr. Reynolds' legal contention has been rejected by the EEOC, and roundly rejected by the courts. Second, his single-minded assault has prevented him from reviewing the current status of continuing discrimination still being practiced against minorities and women.

As to the law, Mr. Reynolds unilaterally claims that the Supreme Court last year in Firefighters Local Union No. 1784 v. Stotts, 104 S.Ct. 2576 (1984), barred court ordered affirmative action remedies that benefit persons who are not identifiable victims of past discrimination. In his view of Stotts, Mr. Reynolds stands alone. Mr. Reynolds' unique position has been rejected by the EEOC: "The General Counsel's Office believes that the Stotts decision only affects the award of retroactive seniority and other similar forms of make-whole relief, and not the use of prospective measures designed to remedy the effects of past discrimination." See Letter from EEOC Chairman Clarence Thomas to Representative Barney Frank (Aug. 30, 1984). Moreover, Mr. Reynolds' unique position has been rejected by every federal court of appeals to address the contention. Vanguards of Cleveland v. Cleveland, 753 F.2d 479, 485-89 (6th Cir. 1985); EEOC v. Local 638 . . . Local 28 of the Sheet Metal Workers' International Association, 753 F.2d 1172, 1185-86 (2d Cir. 1985); Diaz v. American Telephone & Telegraph, 752 F.2d 1356, 1360 n.5 (9th Cir. 1985); Van Aken v. Young, 750 F.2d 43, 45 (6th Cir. 1984); Wygant v. Jackson Board of Education, 746 F.2d 1152, 1157-58 (6th Cir. 1984), cert. granted, 53 U.S.L.W. 3739 (U.S. April 15, 1985); Kromnick v. School District of Philadelphia, 739 F.2d 894, 909-11 (3d Cir. 1984), cert. denied, 53 U.S.L.W. 3483 (U.S. Jan. 7, 1985); see also Turner v. Orr, No. 84-3266 (11th Cir. April 28, 1985).

Despite the fact that his post-Stotts assault on affirmative action is devoid of legal support, he nevertheless claimed in his letters to the 51 government defendent's that the affirmative action consent decrees were illegal under Stotts. Nowhere did Mr. Reynolds explain that his contention had been rejected by the EEOC and by all federal courts of appeals which have addressed the issue.

Even greater disrespect for the rule of law is shown in Mr. Reynolds' stated refusal to defer district court motions in those federal circuits where his contention had already been rejected by controlling court of appeals' precedent. In Mr. Reynolds words: "Since any lower court decision voicing approval of race or gender preferences is suspect after Stotts, we do not view such a case as an impediment to pursuing this initiative and have no plans to circumscribe our inquiry or limit the courts we ask to hear our modification requests." See Letter from Mr. Reynolds to Co-Chairmen of the Lawyers' Committee for Civil Rights Under Law (March 13, 1985). A month later, Mr. Reynolds reaffirmed this same disregard for the rule of law at our meeting with him on April 16, 1985: in his words, he was right and the law was wrong.

The second notable aspect of Mr. Reynolds' single-minded assault on affirmative action is his disregard of the continuing discrimination experienced by minorities and women. In many instances, the contacts made by Mr. Reynolds with the 51 government defendants were the first contacts from the Civil Rights Division literally in years. Not relevant to Mr. Reynolds was whether the consent decrees actually had been followed, or whether the discrimination which had led to the filing of the lawsuits had in fact been curtailed.

For example, the consent decree with Pompano Beach, Florida, is nine years old, yet it appears never to have been enforced. As reported this spring, "To this day, there are no black officers above the rank of patrol officer." Sun-Sentinel (April 4, 1985). According to the same article, there in fact had been no monitoring of the decree for seven years: "Last summer, a Justice Department attorney visited the city for the first time in seven years and found the city in violation of the consent decree, especially in the police department. An independent management consultant accused police management of an "abysmal" affirmative action program." Id.

The lawsuit against the Buffalo Police Department is now twelve years old, yet little has changed. Racial discrimination continues to permeate job assignments: three out of fourteen precincts are still staffed only by white officers; no black officers are assigned to the Narcotics Division; and no black officers are assigned to the Homicide Division. Racial discrimination also continues in promotions: none of the 55 detectives is black; none of the 175 sergeants is black; only one of the 103 lieutenants is black; and only one of the 25 captains is black.

Similar discrimination in promotion continues in the Florida Highway Patrol, despite the Civil Rights Division's six-year-old consent decree. There are only two black corporals, and no blacks at any higher ranks.

In other law enforcement agencies subject to Civil Rights Division consent decrees, recently hired black officers often fear that their jobs are on the line daily. For example, we've recently been in contact with black officers with the New York State Police and with the New Jersey State Police -- both subject to consent decrees -- about forming black police organizations. These officers have told us that while they'd like to join such an organization, they're unwilling to take the lead in forming such an organization; they literally fear retaliation in assignments, in performance ratings, and even in loss of their jobs.

The point of these examples is simply that discrimination in law enforcement is far from over. Yet, it seems to be of little concern to Mr. Reynolds or to his Civil Rights Division. In fact, with the climate being created by Mr. Reynolds, old-style racism may be back in vogue.

Conclusion

If we are to reduce crime in America we must reduce crime in our cities, if we are to reduce crime in our cities we must reduce crime in our minority and poor communities, if we are to reduce crime in our minority and poor communities we must involve the people of these communities. Any system or person who believes that they can solve these problems without involving these people is doomed to failure.

Mr. Reynolds, in his years as Assistant Attorney General for Civil Rights, has exhibited little or no concern for blacks, other racial minorities, or women. He instead has exhibited a consistent disregard for the rule of law. We oppose his confirmation.

Senator MATHIAS. Thank you, Mr. Hampton.

STATEMENT OF ESMERALDA SIMMONS

Ms. SIMMONS. Good afternoon, Senator Mathias, distinguished members of the Senate Judiciary Committee. Thank you for this opportunity to speak on the issues that the confirmation of Assistant Attorney General Bradford Reynolds raises.

I speak as a representative of three distinct but interrelated constituencies. I speak in my official capacity as the first deputy commissioner of New York State's civil rights enforcement agency, the New York State Division of Human Rights.

I speak as a black woman civil rights attorney who has worked in Federal, State, and local civil rights enforcement agencies for the last 7 years.

And I speak as a board member of one of the largest black bar associations in this country: the Metropolitan Black Bar Association of New York City.

I thank you for this opportunity to speak on the Senate confirmation of Assistant Attorney General William Bradford Reynolds.

In each of these capacities I have personal knowledge of the harm that has been generated by the acts and directives of Mr. Reynolds as Assistant Attorney General for Civil Rights in the Department of Justice.

Specifically, under his direction State and local governments which are acting to remedy past discrimination through court decrees and court-ordered affirmative action plans are being challenged by the Justice Department.

In addition, legal and administrative enforcement of civil rights statutes enacted by Congress have been severely curtailed and cut back. And the black population of this Nation, as well as women, the disabled, and other protected classes, the traditional target of racism and discrimination, has suffered severe setbacks, as has been witnessed by the prior testimony, as a direct result of Mr. Reynolds' leadership and policies.

New York State was the first State of this Nation to establish an antidiscrimination agency. Since 1945, the New York State Division of Human Rights and its predecessor agency investigated and adjudicated more than 100,000 discrimination cases. The majority of these cases have been in the area of employment discrimination. Over the years we have handled numerous employment complaints against the uniformed service agencies in New York State, and we have provided technical assistance to several localities and State agencies who have been judged in violation of New York or Federal civil rights laws, or who have voluntarily sought to achieve a more representative work force.

Since 1979 the division has provided technical assistance to the city of Buffalo. In 1979, in the case of *United States* v. *City of Buffalo,* a judgment was handed down by the U.S. District Court for the Western District of New York. That judgment found that the city of Buffalo was in violation of title VII of the Civil Rights Act of 1964, because the Buffalo Police Department had discriminated against black people in its hiring practices.

As part of the remedy for this discrimination, the court ordered that the police department engage in affirmative action to increase minority representation on the Buffalo Police Force. Since 1979, affirmative action has been implemented, and the police force has attempted and succeeded in some facts in the elimination of many of the discriminatory hiring practices and increased the number of blacks on the force.

In 1984, however, the Civil Rights Division of the Justice Department went into the district courthouse in Buffalo and challenged the 1979 judgment in the Buffalo case and is presently attempting to have the court-ordered affirmative action remedy reversed.

Such Federal action thwarts the policies and programs of State and local governments who have for the past 20 years been attempting to eliminate individual and institutional discrimination in employment by legal and oftentimes mandated affirmative action programs.

The New York Times, on April 30, reported that the Justice Department has also urged that the New York State Police Department, the Syracuse Police Department, the Syracuse Fire Department, should modify their affirmative action plans to eliminate hiring goals.

The Justice Department has also initiated action against the Indianapolis Police and Fire Departments and 50 other State and local authorities so that they will abandon their present strong affirmative action plan for weaker substitutes.

Such a brazen attempt to turn back the civil rights clock reveals Mr. Reynolds' fundamental lack of concern about the law. Mr. Reynolds argues that the U.S. Supreme Court decision in *Stotts* declared that numerical approaches and quotas are unconstitutional. In a letter to the editor printed in yesterday's New York Times, Mr. Reynolds asserts that the Court spoke plainly on the subject of quotas in the Memphis case. And in any reading of that decision, it is clear to see that the Court spoke plainly on bona fide seniority systems under title VII, and it spoke plainly on the specific Memphis consent decree. It did not speak clearly on affirmative action; it did not speak clearly on quotas in that case.

As a public servant, Mr. Reynolds, a high-ranking attorney for the Government, and as an officer for the court—Mr. Reynolds owes it to his clients, the American citizens, to explain without his own embellishment or desires or theories exactly what the Court ruled. His continuous embellishment and editorializing of the decision have brought only more confusion and racial tension to a confused and now painful issue.

The Division of Human Rights is opposed to these acts and views the Justice Department's policies and legal position on *Stotts* as one without legal basis, one which can be symbolized as a deliberate crack that has been built in the wall of antidiscrimination, that has been built over the past 20 years.

We attribute the implementation and validation of this policy and these acts to William Bradford Reynolds. Therefore, we oppose his confirmation as Associate Attorney General, and we oppose his appointment to any position with the Justice Department.

As a civil rights attorney——

Senator MATHIAS. I'm sorry to have to cut you off, but I'm afraid——

Ms. SIMMONS. All right, I will submit the rest.

Senator MATHIAS. We have other witnesses who want to testify and we do need to ask several questions.

Ms. SIMMONS. Thank you for the opportunity.

[The following was received for the record:]

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PREPARED STATEMENT OF ESMERALDA SIMMONS, ESQ.

GOOD ____________, SENATOR THURMOND, DISTINGUISHED MEMBERS OF THE SENATE JUDICIARY COMMITTEE. THANK YOU FOR THIS OPPORTUNITY TO SPEAK ON THE ISSUES THAT THE CONFIRMATION OF ASSISTANT ATTORNEY GENERAL BRADFORD REYNOLDS RAISES.

I SPEAK AS A

- A REPRESENTATIVE OF THREE DISTINCT, BUT INTERRELATED CONSTITUENCIES.

I SPEAK IN MY OFFICIAL CAPACITY AS THE FIRST DEPUTY COMMISSIONER OF NEW YORK STATE'S CIVIL RIGHT ENFORCEMENT AGENCY: THE NEW YORK STATE DIVISION OF HUMAN RIGHTS.

I SPEAK AS A BLACK WOMAN CIVIL RIGHTS ATTORNEY WHO HAS WORKED IN FEDERAL, STATE AND LOCAL CIVIL RIGHTS ENFORCEMENT AGENCIES FOR THE LAST SEVEN YEARS.

AND I SPEAK AS A BOARD MEMBER OF ONE OF THE LARGEST BLACK BAR ASSOCIATIONS IN THIS COUNTRY: THE METROPOLITAN BLACK BAR ASSOCIATION OF NEW YORK CITY.

IN EACH OF THESE CAPACITIES, I HAVE PERSONAL KNOWLEDGE OF THE HARM THAT HAS BEEN GENERATED BY THE ACTS AND DIRECTIVES OF MR. BRADFORD REYNOLDS AS ASSISTANT ATTORNEY GENERAL FOR CIVIL RIGHTS IN THE DEPARTMENT OF JUSTICE.

SPECIFICALLY, UNDER HIS DIRECTION:

- STATE AND LOCAL GOVERNMENTS WHICH ARE ACTING TO REMEDY PAST DISCRIMINATION THROUGH COURT-ORDERED AFFIRMATIVE ACTION PLANS ARE BEING CHALLENGED BY THE JUSTICE DEPARTMENT.

IN ADDITION,

LEGAL AND ADMINISTRATIVE ENFORCEMENT OF CIVIL RIGHTS STATUTES ENACTED BY CONGRESS HAVE BEEN SEVERELY CURTAILED AND CUTBACK.

AND, THE BLACK POPULATION OF THIS NATION, TRADITIONAL TARGET OF RACISM

AND DISCRIMINATION, HAS SUFFERED SEVERE SETBACKS AS A DIRECT RESULT OF MR. REYNOLDS' LEADERSHIP AND POLICIES.

NEW YORK STATE WAS THE FIRST STATE OF THIS NATION TO ESTABLISH AN ANTI-DISCRIMINATION AGENCY. SINCE 1945, THE NEW YORK STATE DIVISION OF HUMAN RIGHTS AND ITS PREDECESSOR AGENCY, INVESTIGATED AND AJUDICATED MORE THAN ONE HUNDRED THOUSAND DISCRIMINATION CASES. THE MAJORITY OF THESE CASE HAVE BEEN IN THE AREA OF EMPLOYMENT DISCRIMINATION. OVER THE YEARS WE HAVE HANDLED NUMEROUS EMPLOYMENT COMPLAINTS AGAINST THE UNIFORMED SERVICE AGENCIES IN NEW YORK STATE AND WE HAVE PROVIDED TECHNICAL ASSISTANCE TO SEVERAL LOCALITIES AND STATE AGENCIES WHO HAVING BEEN JUDGED IN VIOLATION OF NEW YORK OR FEDERAL CIVIL RIGHTS LAWS OR WHO HAVE VOLUNTARILY SOUGHT TO ACHIEVE A MORE REPRESENTATIVE WORK FORCE. SINCE 1979 THE DIVISION HAS PROVIDED TECHNICAL ASSISTANCE TO THE CITY OF BUFFALO.

IN 1979 IN THE CASE OF UNITED STATES V. CITY OF BUFFALO A JUDGMENT WAS HANDED DOWN BY THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK. THAT JUDGMENT FOUND THE CITY OF BUFFALO IN VIOLATION OF TITLE VII OF THE CIVIL RIGHTS ACTS OF 1964 BECAUSE THE BUFFALO POLICE DEPARTMENT HAD DISCRIMINATED AGAINST BLACK PEOPLE IN ITS HIRING PRACTICES. AS PART OF THE REMEDY FOR THIS DISCRIMINATION THE COURT ORDERED THE POLICE DEPARTMENT TO ENGAGE IN AFFIRMATIVE ACTION TO INCREASE MINORITY REPRESENTATION ON THE BUFFALO POLICE FORCE. SINCE 1979, AFFIRMATIVE ACTION HAS BEEN IMPLEMENTED AND THE POLICE FORCE HAS ELIMINATED MANY OF ITS DISCRIMINATORY HIRING PRACTICES AND INCREASED THE NUMBER OF BLACKS ON THE FORCE.

IN 1984, THE CIVIL RIGHTS DIVISION OF THE JUSTICE DEPARTMENT WENT INTO THE DISTRICT COURTHOUSE IN BUFFALO AND CHALLENGED THE 1979 JUDGMENT IN THE

BUFFALO CASE AND IS PRESENTLY ATTEMPTING TO HAVE REVERSED THE COURT ORDERED AFFIRMATIVE ACTION REMEDY.

SUCH FEDERAL ACTION THWARTS THE POLICIES AND PROGRAMS OF STATE AND LOCAL GOVERNMENTS WHO HAVE FOR THE PAST TWENTY YEARS BEEN ATTEMPTING TO ELIMINATE INDIVIDUAL AND INSTITUTIONAL DISCRIMINATION IN EMPLOYMENT BY LEGAL AND, OFTEN TIMES, MANDATED AFFIRMATIVE ACTION PROGRAMS.

THE NEW YORK TIMES ON APRIL 30TH, REPORTED THE JUSTICE DEPARTMENT HAS ALSO URGED THE NEW YORK STATE POLICE DEPARTMENT, AND THE SYRACUSE POLICE AND FIRE DEPARTMENTS IN NEW YORK STATE TO MODIFY THEIR AFFIRMATIVE ACTION PLANS TO ELIMINATE HIRING GOALS. THE JUSTICE DEPARTMENT HAS ALSO INITIATED ACTION AGAINST THE INDIANAPOLIS POLICE AND FIRE DEPARTMENTS TO FORCE THAT CITY TO MODIFY ITS COURT APPROVED AFFIRMATIVE ACTION PLAN. IT HAS ALSO URGED THE MORE THAN FIFTY STATE AND LOCAL AUTHORITIES TO ABANDON THEIR PRESENT STRONG AFFIRMATIVE ACTION PLAN FOR WEAKER SUBSTITUTES.

SUCH A BRAZEN ATTEMPT TO TURN BACK THE CIVIL RIGHTS CLOCK REVEALS MR REYNOLDS' FUNDAMENTAL LACK OF CONCERN ABOUT THE LAW. MR. REYNOLDS ARGUES THAT THE USSC DECISION IN FIREFIGHTERS LOCAL UNION NO. 1784 V STOTTS DECLARED THAT NUMERICAL APPROACHES AND QUOTAS ARE UNCONSTITUTIONAL. IN A LETTER TO THE EDITOR PRINTED IN YESTERDAY'S NEW YORK TIMES, MR. REYNOLDS ASSERTS THAT THE COURT SPOKE PLAINLY ON THE SUBJECT OF QUOTAS IN THE MEMPHIS CASE. IN READING THE DECISION IT IS CLEAR TO SEE THAT THE COURT SPOKE PLAINLY ON BONAFIDE SENIORITY SYSTEMS UNDER TITLE VII. IT SPOKE PLAINLY ON THE SPECIFIC MEMPHIS CONSENT DECREE. IT DID NOT SPEAK CLEARLY ON AFFIRMATIVE ACTION. THERE WAS NO CLEAR LANGUAGE OUTLAWING AFFIRMATIVE ACTION OR EVEN QUOTAS IN THE CASE.

AS A PUBLIC SERVANT, AND AN OFFICER OF THE COURT, MR. REYNOLDS OWES IT TO HIS CLIENT, THE AMERICAN CITIZEN, TO EXPLAIN WITHOUT THE EMBELLISHMENT OF HIS DESIRES OR THEORIES WHAT HAPPENED WHEN THE COURT RULED. HIS CONTINUOUS EMBELLISHMENT OF THE DECISION HAS BROUGHT ONLY MORE CONFUSION AND RACIAL TENSION TO A CONFUSED AND NOW PAINFUL ISSUE.

THE DIVISION OF HUMAN RIGHTS IS OPPOSED TO THESE ACTS AND VIEWS THE JUSTICE DEPARTMENT'S POLICY AND LEGAL POSITION AS ONE WITHOUT LEGAL BASIS. ONE WHICH CAN BE SYBOLIZED AS A DELIBERATE CRACK IN THE WALL THAT HAS BEEN BUILT OVER THE PAST 20 YEARS AGAINST EMPLOYMENT DISCRIMINATION.

WE ATTRIBUTE THE IMPLEMENTATION AND VALIDATION OF THIS POLICY AND THESE ACTS TO WILLIAM BRADFORD REYNOLDS. THEREFORE, WE OPPOSE HIS CONFIRMATION TO ANY POSITION WITHIN THE JUSTICE DEPARTMENT.

AS A CIVIL RIGHTS ATTORNEY, I HAVE BEEN AND REMAIN APPALLED BY THE FAILURE OF BRADFORD REYNOLDS' CIVIL RIGHTS DIVISION TO ENFORCE THE LAW OF THIS LAND. I CITE AS EXAMPLES: THE CIVIL RIGHTS DIVISION'S ARGUING IN THE SUPREME COURT IN THE BOB JONES UNIVERSITY CASE THAT PRIVATE SCHOOLS THAT DISCRIMINATE ON THE BASIS OF RACE SHOULD BE ENTITLED TO TAX EXEMPTIONS.

EXAMPLE TWO: SEVERELY CURTAILING THE CASES THAT WERE BROUGHT TO HEARING OR COURT FROM THE FEDERAL OFFICE FOR CIVIL RIGHTS WHICH HANDLES DISCRIMINATION IN EDUCATIONAL INSTITUTIONS.

EXAMPLE THREE: A MAJOR DECREASE IN THE NUMBER AND THE SUBSTATIVE QUALITY OF HOUSING DISCRIMINATION CASES BROUGHT BY THE CIVIL RIGHTS DIVISION.

EXAMPLE FOUR: JUSTICE DEPARTMENT PARTICIPATION IN THE ADMINISTRATION'S ILLEGAL ATTEMPT TO ALTER THE U.S. CIVIL RIGHTS COMMISSION.

AT THE END OF 1984, THE BLACK UNEMPLOYMENT RATE WAS 1.9%, HIGHER THAN TEN YEARS AGO, MORE THAN DOUBLE THAT OF WHITE UNEMPLOYMENT IN THIS COUNTRY AND WORSE THAN THE 1970'S. THE SITUATION FOR BLACK AMERICA IS NOT ENCOURAGING. MR. WILLIAM BRADFORD REYNOLDS AS HEAD OF THE CIVIL RIGHTS DIVISION, HAS ATTACKED THOSE LAWS AND POLICIES WHICH BY ALLOWING BLACK AMERICANS AS A WHOLE TO PROGRESS WERE BEGINNING TO SHOW POSITIVE RESULTS.

FOR ALL OF THE ABOVE STATED REASONS, I URGE THIS COMMITTEE TO VOTE AGAINST CONFIRMATION OF MR. REYNOLDS.

Senator MATHIAS. I wanted to ask Ms. Lichtman if she heard the testimony of Mr. Reynolds with respect to his intentions—or perhaps I should more accurately say the intentions of the Department of Justice—with respect to consent decrees in the second, sixth, and ninth circuits?

Ms. LICHTMAN. I didn't hear it but others who were in the room have reported it to me, so I have heard about it, Senator Mathias. Did you want to ask me a specific question?

Senator MATHIAS. Well, the gist of his testimony was that the Department may not seek to overturn consent decrees in those circuits, which have rejected the broad reading of the *Stotts* case.

Now, does that make you feel any better?

Ms. LICHTMAN. It makes me feel real uncomfortable; it doesn't make me feel a bit better. And let me explain why. In the very few hours since I know he said that, I think in response to a question from Senator Specter, our staff was able to do a very quick and not yet very thorough review, but in that quick review we were able to show that in 11 jurisdictions there is hiring going on, and if his promises to stay out of certain places—I suggest to you that he already has ample excuse to reopen consent decrees in at least 11 jurisdictions, which is really a rather hollow promise; it really isn't promising very much at all.

Senator MATHIAS. What about the famous Jaffree memo? If the administration disapproves of an abortion decision———let's say the *Roe* v. *Wade* case—should the United States seek a review of cases presenting the issues that have been addressed in *Roe* with the hope that all of this negative action—negative from some people's point of view—will build up such a head of steam that the valves will finally burst open?

Ms. LICHTMAN. It's a real fair question, and I think his interpretation here in *Stotts* and what he has essentially gone out to stir up is exactly applicable to what he could do under—if he decided he disagreed with *Roe* or tomorrow he decided he disagreed with *Swann*, one of the leading school desegregation cases. The same kind of behavior could certainly follow.

Let me go back for a second, because I am not sure that I was clear enough with respect to your question about Mr. Reynolds' answer to Senator Specter earlier.

If those jurisdictions believe that they have to follow, as I would submit they are correct, they would be correct in doing, in following existing consent decrees, when they are out hiring in those for instance 11 jurisdictions they would be using the goals and timetables they agreed upon in those earlier consent decrees. And they then immediately leave themselves open to Brad Reynolds and the Justice Department coming into court and attacking them.

And so his promise to Mr. Specter, therefore, doesn't promise a thing. He said he wouldn't initiate, but he is going to have to do that if the jurisdictions abide by the consent decrees that they signed.

Senator **Mathias**. Mr. Hampton, I think you said you represented 35,000 officers.

Mr. **Hampton**. Black police officers.

Senator **Mathias**. Has your organization adopted any resolution or proclamation, any formal collective statement that represents their views?

Mr. **Hampton**. Yes, sir. As recently as 3 weeks ago we met personally with Mr. Brad Reynolds and his staff in his office at the Justice Department, and at that time we stated our strong objection to him not only going into these jurisdictions that have settled consent decrees, but also opening up consent decrees, intervening in consent decrees, but also the lack of enforcement where they have standing consent decrees, as in Pompano Beach and other places. And we from those meetings have put together a position against Mr. Brad Reynolds.

Senator **Mathias**. You say "we." Is that the elected leadership of the association?

Mr. **Hampton**. No, the membership—you see, our organization is made up of approximately 100 organizations all over the country, and a majority of those organizations, as I said in my testimony, are in some type of negotiation or litigation with their municipality over some employment discrimination action, and we have polled our membership, and constantly poll them, working along with the Lawyers Committee for Civil Rights under Law and the American Civil Liberties Union to bring action against those departments and the Justice Department, to fight the Justice Department.

So all of our members are in agreement that we need to stop Mr. Reynolds' nomination.

Senator **Mathias**. Mr. Sloane, at one point this morning while I was participating in the Donald Devine hearing which is proceeding just over our heads on the third floor, I understand that Mr. Reynolds explained that the reason for the slow start in the fair housing cases is that the Carter administration had farmed them out to the U.S. attorneys around the country. I wonder, in the light of your long experience in this field, what you think of that explanation.

Mr. **Sloane**. I don't think it's true, Mr. Chairman. To my knowledge, the Carter administration did not farm out its pattern or practice cases to the U.S. attorneys' offices. That is no explanation whatsoever for the almost total lack of Justice Department activity in fair housing enforcement.

I might say, though, that to some extent we are fortunate that the Justice Department hasn't been as active in fair housing as in other areas. When they have been active in fair housing they have tended to set back the law and have created a good deal of mischief. For example, Mr. Reynolds has been actively seeking to persuade the courts to adopt an intent or motivation test instead of the effects test. I notice that C-SPAN is covering this hearing. About a year ago Mr. Reynolds was in a debate covered by C-SPAN, and I asked him how he could explain his position on intent in light of the *Blackjack* case in which the Justice Department succeeded in establishing effects as the standard of proof. Further, I pointed out that of all other circuits that have considered the issue have adopted the effects test.

Now, I am not sure whether Mr. Reynolds was deliberately misrepresenting or whether he was ignorant of the law. But he announced on C-SPAN that the *Blackjack* case was the only case that upheld the effects test. That statement is simply wrong as a matter of law. At best, it represents indefensible ignorance by the Assistant Attorney General. At worst, its represents deliberate misrepresentation.

There are other examples of mischief that the Justice Department has created in the fair housing area. Two cases, if I can have a moment, are really bizarre. There has been a bitter lawsuit going on in the New York City area involving the Starrett City apartment complex. The two parties fought out an expensive and exhausting battle for nearly 5 years, and then determined to settle the case through a consent decree. The consent decree was an equitable one which would result in expanded housing opportunities for minorities. The Justice Department had sat back all these years and done nothing. At the moment the consent decree was submitted for court approval, the Justice Department took two actions: it submitted an amicus brief opposing the consent decree, and filed its own lawsuit, after having done nothing for the nearly 5 years of the private litigation.

Contrast that with the *Gersten* case in California, which I believe you mentioned this morning, Senator. Private parties brought a lawsuit against a landlord charging unlawful discrimination. The Justice Department was aware of the suit and declined to intervene. Instead, Justice brought its own lawsuit, and quickly settled the case through a consent decree, which, as usual with Justice Department consent decrees, was unsatisfactory. The private plaintiffs pursued the case and then reached a settlement with the defendants, involving a consent decree which provided broader relief. The Justice Department has now sought to intervene in the court not just objecting to the consent decree, but claiming that the court has no jurisdiction to approve that consent decree in light of the Justice Department's prior consent decree. These are two examples of Justice mischief. The two cases, taken together, represent attempts to interfere on both ends of private litigation. In *Starrett City,* Justice interferes at the finish in and effort to thwart a reasonable settlement. In *Gersten,* Justice interferes at the outset and seeks to prevent broad relief for private litigants.

The inactivity I think is shameful. Justice Department lawyers are given nothing to do more than busy work. This is a terrible waste of precious legal talent. But when they do get active under Mr. Reynolds' leadership, they cause great mischief and even chaos.

Senator **Mathias**. When I was inquiring about relief that had been obtained in housing cases, he did emphasize the importance of the injunctions that the Justice Department had successfully obtained.

If you recall the question I asked, I raised some doubt about the effectiveness of the relief.

What do you think of the strength of injunctive provisions?

Mr. **Sloane**. They are what we call in litigation "bad-boy" injunctions. Guilty defendants are merely admonished not to do it again. And that is pretty much what the Justice Department has secured in the way of relief in fair housing cases, as opposed to affirmative steps to assure that minorities who have been discriminated against will, in fact, have full access through outreach programs. The Justice Department, under Mr. Reynolds, goes in for "bad-boy" injunctions, not the kind of relief that will undo the past effects of housing discrimination.

Senator **Mathias**. Does the fair housing network have some estimate of how well compliance with the decrees has been monitored?

Mr. **Sloane**. With the Justice Department decrees?

Senator **Mathias**. Yes.

Mr. **Sloane**. There has been no systematic effort to monitor compliance. I was rather surprised when Mr. Reynolds said that the Justice Department monitored compliance with their decrees. Not to my knowledge and not in my recollection do they do that. They are simply not equipped to do it. But, then again, they do hardly anything else.

Senator **Mathias**. Since Mr. Neas was the perfect witness, expressed himself with concise and complete testimony and ended right on time, I won't ask him any questions. [Laughter.]

Thank you all very much.

Ms. **Lichtman**. A very quick comment, perhaps about procedure and perhaps about substance—I will let you be the judge.

I think many of us raised many very serious questions about Mr. Reynolds, and I heard Senator Thurmond say this morning that he hoped to have the committee decide tomorrow. I think significant enough questions were raised about various topics, from education to housing and employment, that there ought to be lots of questions that you all have—and those of you Senators who are not in the room, you know who you are as well as I know who you all are—that your Senators ought to be asking Mr. Reynolds some very significant questions.

Senator **Mathias**. I would agree with you. Serious questions have been raised, certainly by this panel. I was in the Devine hearings; so I did not hear the testimony of the previous panel. But I think these are serious questions, and they won't be ignored.

Ms. **Lichtman**. Thank you very much. I have some testimony that I respectfully request be put into the record of people who were here, but unhappily had to leave before they were called.

Senator **Mathias**. Could you give us their names?

Ms. Lichtman. Yes, one is on behalf of Mr. John Brittain from the University of Connecticut Law School, and I believe that the request was formally made. And the other is Mr. Gordon Graham's, who did testify earlier, but unfortunately left without leaving his formal testimony.

Senator Mathias. Without objection, those statements will be included in the record.

Ms. Lichtman. Thank you.

[The following was received for the record:]

Statement
of
John Brittain, Professor of Law,
University of Connecticut School of Law
on behalf of
The National Lawyers Guild,

Mr. Chairman, members of the Committee, thank you for the opportunity to present this testimony before the Committee on behalf of the National Lawyers Guild. We are joined in this testimony by the National Conference of Black Lawyers and the Center for Constitutional Rights with whom we have submitted numerous briefs to the U.S. Supreme Court and lower courts in cases regarding affirmative action.

The National Lawyers Guild, and its over 7,000 lawyers, law students and legal workers, has been for almost 50 years a progressive voice in the legal community. We have a demonstrated commitment to using the law to promote social and economic justice.

We are here today to strongly oppose the elevation of William Bradford Reynolds to the position of Associate Attorney General.

The Attorney General, as head of the Justice Department, is required to uphold and enforce the laws as passed by Congress and interpreted by the Court. The Associate Attorney General, as the third ranking member of the Justice Department, will be integrally involved in all Justice Department policy and other decisions.

The NLG believes, and common sense dictates, that in order to be minimally qualified to become the Associate Attorney General, or any official in the Attorney General's office, the nominee must be committed to enforcing all the laws, not just the ones with which he agrees. He cannot view himself as above the Congress and the Court. He cannot substitute his own personal and ideological views about what the law should be for what the law is. He cannot ignore or distort the decisional law to conform with his ideology.

The NLG was recently requested to, and on April 3, 1985, did present testimony to the House Committee on the Judiciary, Subcommittee on Civil and Constitutional Rights regarding the enforcement of civil rights by the Civil Rights Division of the Justice Department.[1]

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[1] A copy of this testimony is attached and made part of this testimony by reference.

Our review of the enforcement efforts of the Civil Rights Division of the Justice Department, under the direction of the nominee, William Bradford Reynolds, shows that on all scores, that is, his willingness to enforce all the laws and act in conformance with statutory and decisional law, Mr. Reynolds flunks the test of minimal qualifications.

Indeed, as shown in the attached testimony, ever since taking office at the Civil Rights Division, Mr. Reynolds has launched a concerted campaign to ignore, and/or distort, both statutory and decisional civil rights law to conform to his ideological leanings, thus making a mockery of the very purposes of the Civil Rights Division.

Nowhere is this more evident than in the Civil Rights Division's response to the Supreme Court's decision in the Firefighter's Local #1784 v. Stotts, 105 Supreme Court 2576 (1984).

In that case, the Supreme Court had before it certain modifications to a consent decree regarding affirmative action in the Memphis Fire Department made by the District Court where the consent decree had been entered. This consent decree called for race conscious goals for the hiring and promotion of black fire fighters. The modifications had been made to the otherwise applicable seniority system so as to preserve the gains made under the decree during a period of layoff. The Sixth Circuit Court of Appeals affirmed the District Court, but the Supreme Court reversed and held that the seniority system could not be changed in that manner and under those circumstances.

The Civil Rights Division has deliberately distorted the Stotts holding to mean that all affirmative action in hiring and promotion is now prohibited. Nothing in Stotts says this, and indeed, if the Supreme Court had meant to reach such an extreme conclusion, it had before it a consent decree which contained such affirmative hiring and promotion remedies. The consent decree was left intact. Leaving it intact was and is consistent with the opinions from all eleven Circuit Courts of Appeals which have dealt with the issue. Further, the Supreme Court does not overrule a body of decisional law sub silencio. Where a case or a body of law is being overruled by the Supreme Court, the Justices say so. Thus, acting on what is, at best, dicta in Stotts, the Civil Rights Division has written to over 50 municipalities which have consent decrees calling for hiring and other affirmative remedies, telling them that these decrees are now in violation of the Supreme Court's decision in Stotts, and requesting that they renegotiate the consent decree and remove any affirmative remedies.

The overwhelming majority of the municipalities have refused to comply with Justice's request. At this time, the Civil Rights Division has gone into court in Buffalo, Boston, Washington, D.C., Indianapolis, San Diego and Chicago in attempts to change the consent decrees, and thus betray the very plaintiffs they previously purported to represent.

Mr. Reynold's willingness to distort the Supreme Court decision in Stotts to conform to his personal views of civil rights stands in marked contrast to his attempts to abandon and/or deny the existence of the "effects" test for proving discrimination in housing and employment cases. Citing a few cases which are not on point, Mr. Reynolds has refused to bring action or has switched legal theories in midstream so as to avoid the Court following this branch of decisional law. His rationale is that the law in this area is unclear. The law, however, is clear; Mr. Reynolds simply chooses to ignore it.

In the conclusion to our April 3 testimony we stated:

> "William Bradford Reynolds is the embodiment of the Reagan Administration's contempt for law. His continuation in office is a dangerous precedent for future assistant Attorney Generals and threatens the rights of this country's disadvantaged. The National Lawyers Guild believes that his actions must be censured and he must be removed from office."

It should not be the practice of the Senate to reward with a promotion an Assistant Attorney General who has failed and refused to enforce the civil rights laws passed by this body. In this instance, should the Senate approve the promotion of Mr. Reynolds, it will be an unconscionable betrayal of the public trust.

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STATEMENT

of

Jules Lobel and Barbara Wolvovitz, Representing
The National Lawyers Guild, Regarding
The Enforcement of Civil Rights by the Civil Rights
Division of the Justice Department

BEFORE

The House Committee on the Judiciary
Subcommittee on Civil and Constitutional Rights
April 3, 1985

Mr. Chairman and members of the Committee, thank you for the opportunity to present this testimony before the Committee on behalf of the National Lawyers Guild.[1] The National Lawyers Guild was founded in 1937 as the first integrated Bar Association and now has over 7,000 members. As an organization, we are committed to the use of law as a tool to promote social and economic justice for poor and working people, racial minorities and women. Our members are in the forefront of civil rights litigation and historically have been intimately involved in the struggles of the 1950's and 60's. As a result of our long involvement with the civil rights movement we are alarmed by the positions taken by the Department of Justice since the Reagan Administration has been in office.

I. OVERVIEW

The Reagan Administration has launched a systematic attack on the constitutional and statutory rights of minorities and women contained in the civil rights statutes and the Thirteenth, Fourteenth and Fifteenth Amendments. Those Admendments, and the

Civil Rights laws which Congress has enacted to enforce the promise of equality contained in the Constitution, mandate an affirmative obligation on the part of the Federal government to protect the rights of those who have been excluded from the American dream. As Judge Wisdom has pointed out, "The Constitution calls for equal treatment under the law, and in light of the pervasive past discriminatory practices and the present effects of these practices, in many cases this goal can be achieved only by taking active affirmative steps to remove the effects of prior inequality."[2] Yet this Administration, far from taking active, affirmative steps to root out and rectify discrimination, has proceeded to erect obstacle upon obstacle the enforcement of American's basic rights. Whatever may be the technical reasoning or argument of the Administration in each case, the pattern and practice is clear--whether in housing, school desegration, employment, municipal services or higher education--the administration has abandoned the very people that historically these Constitutional Amendments and statutes were designed to protect.

The Justice Department's Civil Right's Division has long been the centerpiece of the federal civil rights commitment. Yet under this Administration, the Division has reversed the bipartisan approach to Civil Rights that has characterized the last 20 years. Again and again, the Reagan Administration has failed to uphold and enforce settled law and past Administration's practice in the field of civil rights.[3] In contrast to its refusal to enforce well established legal principles on behalf of the rights of minorities and women, the Civil Rights Division has taken an expansive and overreaching interpretation of the law when necessary to impinge upon the gains won by minorities and women in the past decades.

This betrayal of the interests of minorities and women by the Federal Government is much more than a dispute about which remedies may be employed in particular cases. Fundamentally, the present ideology and attitude of the Justice Department calls into question the very nature and existence of constitutional and statutory civil rights as well as the federal government's obligation and the private citizen's ability to enforce those rights.

At bottom, the Reagan Administration's attitude toward civil rights constitutes a denial of institutional racism and sexism. "When a vice is inherent in a system the vice can be eradicated only by restructuring the system."[4] Racism and sexism are vices which are institutionalized in many state, county and municipal governments as well as private enterprises. By ignoring that institutional racism and sexism, the Adminstration looks only at the actions and motives of individuals and the harm suffered by individuals. If this position is continued and eventually accepted as the law, the clock will be turned back 100 years to the betrayal of the original civil rights acts of the 1860s and 1870s.

Our testimony will review three areas in which the Justice Department positions and actions have been wholly unwarranted under the current law and destructive to the aims of the civil rights legislation they are mandated to enforce. The three areas are: the Justice Department's response to the Stotts decision of the Supreme Court, their enforcement of Title VIII, the fair housing laws, and the widespread attempt to erode the disparate impact standard in various areas of law.

II. Title VII & Affirmative Action

The Civil Rights Division's present perspective on the enforcement of civil rights is exemplified by its response to the Supreme Court's opinion in the case of Firefighters Local Union No. 1784 v. Stotts.[5] While the Supreme Court in Stotts framed the issue as whether the District Court exceeded its powers in requiring white employees to be laid off instead of blacks in violation of an otherwise applicable seniority system, the Department has interpreted the Stotts decision far more expansively to prohibit all affirmative action in hiring and promotion under Title VII.

This position undermines the policies embodied in Title VII as well as the underlying principles contained in the Thirteenth and

Fourteenth Amendments. The Thirteenth Amendment was designed not only to prohibit chattel slavery but to eradicate the badges and incidents of slavery."[6] One of the cornerstones of slavery was the race-based denial of equal opportunities . . ."[7] Similarly the Supreme Court has noted that a critical objective of Title VII is "to eliminate, so far as possible the last vestiges of . discrimination.[8] A key method of carrying out both the legislative and constitutional mandates to eradicate discrimination root and branch is to fashion race-conscious remedies against our society's sytemic racial discrimination against blacks as a class.

There is significant evidence that affirmative action does have an impact. Minorities and women have made greater gains in employment at those establishments subject to affirmative action requirements, than at companies not subject to such requirements.[9] For example, a study conducted by the Office of Federal Contract Compliance in 1983 found that minority employment increased 20.1% and female employment 15.2% between 1974 and 1980 for federal contractors subject to affirmative action requirements despite total employment gains of only 3%.[10] For non-Federal contractors not subject to affirmative action requirements, minority employment measured 12.3% and female employment only 2.2% despite an 8.2% growth in total employment over the same period.[11]

By opposing affirmative action plans the Civil Rights Division eviscerates the policies of Title VII and slams the door on minority and female job opportunities. The case of Paradise v. Department of Public Safety currently pending before the Eleventh Circuit Court of Appeals provides an illustrative example of the consequences of the Justice Department's position. In that case, in 1972 the District Court found that the defendant Alabama Department of Public Safety, had engaged in a blatant and continuous pattern of racial discrimination for 37 years, during which it did not have a single black trooper.[12] Despite the entering of a decree imposing hiring requirements for blacks at the entry level, by late 1978, nearly 7 years after the original order, the Department did not have a single Black corporal.[13] By December 1983, despite numerous decrees designed to ensure racially neutral promotion policies, the Department still did not employ a single Black at any rank above corporal and only 6% of its corporals were Black in a state containing a sizeable Black population. Given the inability of Court orders to obtain equality in promotion, the Court ordered a 1 to 1 temporary promotion policy. The Court found that such relief was necessary because:

> the racial imbalances in the upper ranks of the Alabama Department of Public Safety remain egregious and are now of long duration; and, furthermore, it is apparent from the history of this lawsuit that without immediate, affirmative, race-conscious action these intolerable disparities will not dissipate within the near future."[14]

Yet despite the clear need for affirmative relief, the Justice Department has filed a brief in the Paradise case urging the Court of Appeals to reverse the District Court's order because it argues that the Stotts case bars such affirmative relief.[15] By doing so, the Justice Department is allowing the situation to continue unrectified.

The Administration embraces as an alternative approach the use of recruitment goals. However, even the use of such goals contradicts its basic approach. It is not immediately apparent why an Employer granting preferences as to who it will try to recruit based on race is lawful, why its granting preferences in the actual hiring process is not. Moreover, the question arises of what happens when an employer meets the recruitment goals and timetables, but still fails to hire meaningful numbers of minorities or women. It would be inconsistent for the Justice Department to argue that the Court must then impose hiring goals. However, if that is not done, one fails to see the impact of recruitment goals. In fact, it is logical to presume that in the future the Administration will move away from even numerical recruitment goals as contradicting its basic ideological premise.

The Civil Rights Division's view of Stotts is not only destructive to continued progress towards equality, but it totally unwarranted. The Division's is at odds with the unanimous view of all of the Circuit Court of Appeals that race-conscious affirmative action goals can be appropriate under Title VII,[16] and has not been accepted by the Federal Courts which have

addressed the issue since the Supreme Court's decision in Stotts.[17] Yet the Justice Department would have us believe that the Supreme Court reversed the unanimous opinion of all the Federal Courts of Appeal without even mentioning those opinions or giving the slightest indication that those decisions are overruled. Indeed, where the court has intended to overrule substantial Circuit Court precedent, it has clearly indicated that it is doing so, as did Justice White did in the Washington v. Davis[18] and Justice Stewart in International Brotherhood of Teamsters v. United States.[19] It is simply hard to believe that the Supreme Court intended to radically change the well-established Title VII law without saying so.

Yet, despite the fact that the Supreme Court's opinion in Stotts did not directly address the question of whether any affirmative action in hiring or promotion was permitted under Title VII; despite the unanimous view of the Courts of Appeals before and after Stotts that such plans are valid; despite the long-established and bipartisan policy of the Justice Department and EEOC under the Nixon, Ford and Carter administrations to seek such affirmative action plans to remedy past discrimination--William Bradford Reynolds has sent letters to approximately 50 cities, counties and state agencies across the country stating that consent decrees with goals contemplating preferential treatment to victims of discrimination, are plainly

contrary to Stotts. The letters recommend that the City, County and State defendants join the Justice Department in filing a motion in Court of modify the consent decree to remove any hiring goals from these consent decrees.[20] To demonstrate the consequences of a city's failure to agree, the Justice Department has moved in Federal District Court in Buffalo to modify or vacate the city's consent decree and has stated that it will take similar action in the coming weeks in other cities.[21]

Without waiting for a definitive court ruling, the Justice Department is therefore seeking to vacate or modify decrees which prior administrations negotiated with City, County and State defendants. The Justice Department has reversed its position from that of plaintiff to one of supporting the defendants, leaving the real plaintiffs in interest without representation in many of these situations.

Moreover, based on an unwarranted reading of the Stotts opinion, the Justice Department is taking a shotgun approach towards interfering with dozens of affirmative action programs which are working in various cities and counties across the country. Important strides have been made in those cities and counties which have consent decrees mandating affirmative action programs. In Boston, the city's police and fire departments have expanded minority employment from 1.73% in the aggregate to 11.7% in the police department and 14.7% in the fire department as of

1981 since entering into a consent decree in the early 1970's.[22] Similarly in San Diego there has been substantial job increase among minorities in county employment since the entering into of a consent decree in 1977 containing affirmative goals.[23] Yet the Civil Rights Division now wishes to vacate virtually all of the decrees at a time when some progress is being made.

Moreover, the means in which the Department has chosen to reverse the position taken by prior administrations demonstrates an overzealousness in undermining the rights of Blacks, Hispanics and women. Based on what essentially amounts to dicta in the Stotts opinion, the Justice Department takes a position at odds with the present law of the Circuits and past Administration positions. However, if the Justice Department wanted to change the present law, the means to accomplish that end would be to choose one or two test cases and litigate the issue. There is already a case in the Eleventh Circuit Court of Appeals, Paradise v. Dept. of Public Safety where the United States as plaintiff-appellant directly raised the issue of the permissibility of affirmative action plans. Various District Court proceedings have also addressed the issue as well as Circuit Court cases such as Devereaux v. Geary where the United States has filed an amicus brief.[24] Pending resolution of this issue, and particularly given that even after Stotts, various District and Circuit courts have rejected the Justice Department's position, why has the Department attempted to get 50 cities and counties to modify their decrees. Certainly it cannot be that the law is clear. The only logical answer is that the Department is seeking a wholesale vacation of these affirmative action plans irrespective of what the Supreme Court eventually rules is the law. For once these decrees are vacated or modified, it is extremely unlikely that they will ever be re-instituted. That the Justice Department's position is based not on the law, but on its own ideological position, can be seen in the San Diego case. There, even prior to the Stotts case, the Justice Department shifted policy and joined in defendant's motion to vacate the consent decrees, a motion which was denied by the Court on March 5, 1983.[25] What the Department is hoping to accomplish is the dismantling of affirmative action programs even if affirmative action in hiring is eventually upheld as lawful. For it to seek such a massive change in consent decrees around the country without first obtaining a definitive court opinion changing the present law is for the Department to abdicate its responsibility of enforcing the law. It stands in sharp contrast to the Department's attitude towards enforcing laws beneficial to minorities and women, where the Administration argues that unclarity in the law prevents it from taking a strong position.

III. FAIR HOUSING LAWS

With the passage of the Title VIII of the Civil Rights Act the federal government committed itself to the prohibition of discrimination in private and public housing and provided some mechanisms necessary to achieve that goal. It created a private right of action for the victims of discrimination and gave the Attorney General authority to institute litigation where there was a pattern or practice of discrimination.

Under both Republican and Democratic administrations between 1968 and 1978, the Civil Rights Division of the Justice Department filed more than 300 cases, averaging approximately 32 cases per year.[26] During the four years of the Carter Administration a total of 66 cases were brought for an average of over 16 per year.[27] The record of the Reagan Administration is pitiful in comparison. In its first year, 1981, no cases were brought.[28] The second year showed a slight improvement--a total of two cases were brought.[29] As public outrage grew over the total lack of enforcement, the Department felt compelled to initiate more suits and in 1983, a total of five suits were initiated and the Justice Department intervened in one suit.[30] Recognizing this low level of activity as a political liability, between March and the election in November, 1984 a total of seventeen cases were commenced.[31] However, a closer analysis of this spurt of litigation shows it to be misleading because six of the cases attack alleged racial steering of home buyers by real estate brokers in the Chicago area and therefore actually represent, in effect, a single case against a problem in one particular geographical area.

Two of the cases that are touted by the Division as proof of its concern with housing discrimination are the Gerston and Starrett City cases. Gerston was a suit filed against a large housing project which maintained a racial quota in order to maintain integrated housing as is the Starrett City case.[32] Both of these housing projects are integrated housing projects which use "racial quotas" in order to maintain integration and are not segregated housing projects. While there is a great deal of debate about whether this use of quotas to maintain integrated housing is the best method to end housing segregation, there is no doubt that the allocation of scarce federal resources to end racial discrimination in housing is more appropriately employed against those landlords that maintain segregation and not against those that are attempting to maintain integrated housing.[33] And this is the future area of emphasis for the Division's fair housing litigation.

Prior to the Reagan administration, the Department made a significant contribution to the development of case law that enhanced the effectiveness of Title VIII. One of the key concepts is the application in housing cases of the "effects" test recognized in employment discrimination cases. The prior Justice Department position that a violation of the Fair Housing Act can be proven by showing that either an intentional act of discrimination has been committed or that the actions taken have had a discriminatory effect has been adopted by six Courts of Appeals, and is recognized as the current state of the law.[34]

As discriminatory actions become more and more sophisticated, and less overtly racist, the availability of an "effects" test is absolutely critical to effect real change in segregated housing patterns. This interpretation of Title VIII was supported at the time of its enactment and reaffirmed during consideration of proposed amendments to the Fair Housing Act in 1980 and has been the standard employed by previous Administrations of both parties. But, the Reagan Administration has chosen to proceed as though that standard does not exist. In the recent case of U.S. v. City of Birmingham[35] the Division changed its litigation strategy in midstream switching to a standard of discriminatory intent from the "effects" test,[36] despite the impact test's acceptance. Similarly in Angell v. Zinsser,[37] according to Section Chief Robert Reinstein, Division attorneys had organized their legal and trial tactics using the "effects" test concept but were ordered not to use that theory by Reagan appointees. This new approach resulted in an adverse decision by the Court.[38] In response to charges by the "Civil Rights establishment" that the Divisions' decision to not use the effect standard is improper, Reynolds argues that the law is not clear.[39] The cases he cites in support of utilizing solely an intent test are inapposite. The first, Joseph Skillken & Co. v. City of Toledo[40] is a case which analyzes the requirements of proving a constitutional violation. Requiring a higher standard for the constitutional violation does not mean that the Court would have a similar requirement for a Title VIII violation and therefore does not actually support Reynolds' position. The second case cited by Reynolds is the Second Circuit decision in Boyd v. Lefrak.[41] What Reynolds conveniently fails to mention is a subsequent Second Circuit case, Robinson v. 12 Lofts Realty,[42] where the Court holds that a Title VIII violation has a burden of proof similar to that of Title VII, the effect test,[43] and distinguishes and limits its earlier holding in Boyd.[44] Therefore it appears that the legal dispute does not actually exist and has been manufactured to justify the Department's new position.

As a consequence of the decision to employ a legal strategy, of refusing to utilize the effects test, the people whose interest the Justice Department represented in Angell lost their right to be free from racial discrimination in housing because counsel did not adequately represent their interests. The Justice Department has chosen to employ a litigation strategy that is destined to fail. Through this choice, it begins to reverse over ten years of a positive approach which made some inroads towards breaking down systemic and institutional discrimination. In its place it has substituted a legal theory which at its best can only remedy a very small number of cases and have minor impact.

IV. THE GENERAL RETREAT FROM THE DISPROPORTIONATE IMPACT TEST

The retreat from Civil Rights enforcement efforts has not been limited to remedies. As in the area of housing litigation, the Administration is moving to redefine and limit the nature of the right granted by Title VII. Instead of looking at institutional racism and sexism as embodied in statistical evidence of the effect of various employment decisions on Black, Hispanic and female employment, the Administration is moving towards reinstating the search for particular evil employers with discriminatory motive. Under the Supreme Court's test in Griggs v. Duke Power Co., 401 U.S. 424, proving discriminatory intent is not necessary to establish a Title VII, disparate impact suffices. However in Connecticut v. Teal, 102 S. Ct. 2525 (1982), the U.S. tried to create an exception to the Griggs decision. The court rejected the Justice Department's position characterizing it "as offering the employer some special haven for discriminatory tests." Id. at 2533. As the Court pointed out, the Government was confusing the search for evil motive on the part of the employer with the traditional test of the impact of the test on Black and Hispanic employees.

More recently the Administration has attempted to change the Uniform Guidelines of Employee Selection Procedures, 29 CFR Part

1607, 43 Fed. Reg. 38290 which were adopted by the Department of Justice, the Department of Labor and the former Civil Service Commission (now the Office of Personnel Management) and the EEOC in 1978. These guidelines and the Supreme Court's decision in Griggs presume that a test which has a substantial adverse impact on the employment opportunities of Black and Hispanic employees was prima facie invalid unless the employer has shown the test, "by professonally acceptable methods, to be predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated."[45] Yet despite the fact that these rules have been responsible for much of the job advancenent of Blacks, Hispanics and women over the last two decades, the Administration now proposes to change the Uniform Guidelines. The new theory apparently favored by the Adminstration would permit general cognitive ability tests to be validated generally, and not simply for the particular job involved. Such a change would in effect shift the presumption of invalidity of a test which had an adverse impact on minorities or women and radically alter the Griggs test.[46] The Chairman of the EEOC, Clarence Thomas has stated "that statistics have been terribly overused. Every time there is a statistical disparity it is presumed that there is discrimination."[47] In fact that is preciaely what the Supreme Court in Griggs decided should be done.

Thus it is not surprising that Chairman Thomas has argued that "recent decisions of the Supreme Court may have 'drawn into question' landmark rulings in cases such as Griggs v. Duke Power Company decided in 1971"[48] and that the Stotts case "modified Griggs."[49] Again, as with the Justice Department view of Stotts, the administration is seizing on the Stotts case to make assertions which are totally baseless. The Griggs opinion is not even mentioned by the Supreme Court in Stotts. Yet, EEOC's agenda for review of the Uniform Guidelines expressly questions the adverse impact standard and the Griggs decision.[50]

Nor is this undermining of the impact standard in Title VII confined to the EEOC. According to long time Civil Rights Division employees, it is getting much harder to bring a testing case. At least one testing case is apparently now being held up, while in another the Division is holding up the proposed findings of fact being submitted by the Department's lawyers. Certainly, undermining the Griggs standard is consistent with the broad attack launched by the Division on the impact standard in a wide variety of contexts.

As already indicated in Title VIII of the Civil Rights Act, the Department has abandoned the adverse impact standard. The passage of Title VI of the Civil Rights Act prohibiting discrimination by recipients of federal funds led to numerous federal agencies promulgating regulations that proof of discriminatory effect will suffice to prove a Title VI violation. More than 10 years ago, Solicitor General Bork, in the Nixon Administration took the position that the "effects" test adopted by the regulations were valid and convinced the Supreme Court to adopt that standard,[51] a standard followed by the Ford and Carter Administrations.[52] However, William Bradford Reynolds urged the Solicitor General to argue in a recent Supreme Court case that the regulations were invalid and should be abandoned.[53] Fortunately the Solicitor General's office rejected this attempt and the Supreme Court eventually reaffirmed the validity of the disparate impact standard of the regulations.[54]

In voting rights the Administration adamantly opposed the House bill extending and strengthing the Voting Rights Act which was scheduled to expire in 1982. The Administration objected to inter alia, the part of the House bill which established that voting laws which had discriminatory results or effects would violate the law.[55] Only after massive public and congressional opposition to its position, did the Administration finally support and sign an extension of the Voting Rights Act based on the House bill.

Similarly, despite the advice of career supervisors to bring suits challenging the discriminatory of effects of a pattern and practice of lower level of municipal services provided to black neighborhoods in such communities as Marianna, Florida and

Jefferson, Texas, Mr. Reynolds obstructed the filing of such suits.[56]

Thus, we see in every area, Voting Rights, Housing, Employment Discrimination, Municipal Services recipients of Federal aid, the Administration and its Justice Department has opposed, obstructed and attempted to get around a construction of civil rights statutes followed by past Republican and Democratic administrations which would define a violation of civil rights based on the effect of the challenged action.[57] In opposing the "effects" test, the Justice Department again demonstrates its refusal to address institutional racism and sexism. It also demonstrates that it sees its mission not as enforcing existing civil rights law, but obstructing such enforcement. The same logic which refuses to recognize the necessity for affirmative action, refuses to look beyond discriminatory motive to the effect of the challenged action. For affirmative action and the effect tests are simply opposite sides of the same problem--both reflect a recognition that racism is not simply the product of evil intent, but of supposedly neutral standards which perpetuate past discrimination.

Conclusion

William Bradford Reynold's and the Civil Rights Division's efforts in the area of civil rights have been focused not on assuring equality for those who have traditionally been outside of the American dream, but instead on rolling back the advances made in the 1960s. These actions are not carrying out the duty of an assistant Attorney General to enforce the law, but instead are acting in disregard of the law. This dereliction of duty seriously threatens the rights of large sections of the American population--Women, Blacks, Hispanics, Asians, the disabled and Native Americans. Such conduct, far from being consistent with the Constitutional obligation to enforce the law makes a mockery of such enforcement.

William Bradford Reynolds is the embodiment of the Reagan Administration's contempt for law. His continuation in office is a dangerous precedent for future assistant Attorney Generals and threatens the rights of this country's disadvantaged. The National Lawyers Guild believes that his actions must be censured and he must be removed from office.[58]

1. At the outset of our testimony we would like to thank the various students, Francis D'Eramo from the University of Pittsburgh, Elsie Chandler, Estelle Bronstein and other students from Rutgers Law School and Robert Zuss at City University of New York Law School at Queens who helped prepare this testimony.

2. Williams v. City of New Orleans, 729 F.2d 1554, 1573 (5th Cir. 1984) (J. Wisdom concurring).

3. See Days, Turning Back the Clock: The Reagan Administration and Civil Rights, 19 Harv. Civ. Rts.-Civ. Lib. L. Rev. 309 (1984), Reagan Civil Rights: The First Twenty Months, a Report by the Washington Council of Lawyers (1982).

4. Williams v. City of New Orleans, 729 F.2d 1554, 147 (5th Cir. 1984) (J. Wisdom, concurring).

5. 106 S. Ct. 2576 (1984).

6. Jones v. Alfred Mayer Co., 392 U.S. 409 (1968).

7. Williams v. City of New Orleans, 729 F.2d 1554, 1579 (5th Cir. 1984) (J. Wisdom, concurring).

8. Albermale Paper Co. v. Moody, 422 U.S. 405, 418 (1975).

9. Affirmative Action to Open the Doors of Job Opportunity: A Report of the Citizen's Commission on Civil Rights, June 1984 at 122-9.

10. Office of Federal Contract Compliance Programs, Employment Standards Administration, A Review of the Effect of Executive

Order 11246 and the Federal Contract Compliance Program or Employment Opportunities of Minorities and Women (1983) at 8.

11. Id.

12. Paradise v. Department of Public Safety (C.A. 11th Cir.) (No. 84-7053) Record on Appeal p. 74-75. See NAACP v. Allen, 340 F. Supp. 703, 705 (M.D. Ala. 1972).

13. Paradise v. Shoemaker, 470 F. Supp. 439, 442 (M.D. Ala. 1979).

14. Paradise, supra note 12, Record on Appeal at 172.

15. Paradise, id., Reply Brief of the United States.

16. See, e.g., Boston Chapter, NAACP, Inc. v. Beecher, 504 F.2d 1017, 1027-1028 (1st Cir. 1974), cert. denied, 421 U.S. 910 (1975); Association Against Discrimination Inc. v. Bridgeport, 647 F.2d 256 (2nd Cir. 1981); Rios v. Enterprises Ass'n Steamfitters Local 638, 501 F.2d 622, 629 (2d Cir. 1974); EEOC v. American Tel. & Tel. Co., 556 F.2d 167, 174-77 (3d Cir. 1977), cert. denied, 438 U.S. 915 (1978); Contractors Association of Eastern Pennsylvania v. Secretary of Labor, 442 F.2d 159 (3rd Cir.), cert. denied, 404 U.S. 854 (1971); Patterson v. American Tobacco Co., 535 F.2d 257, 273-4 (4th Cir.), cert. denied, 429 U.S. 920 (1976); Chisholm v. United States Postal Service, 665 F.2d 482 (4th Cir. 1981); United States v. City of Alexandria, 614 F.2d

1358, 1363-66 (5th Cir. 1980); Williams v. City of New Orleans, 729 F.2d 1554 (5th Cir. 1984) (en banc); United States v. I.B.E.W., Local No. 38, 428 F.2d 144 (6th Cir.), _cert. denied_, 400 U.S. 943 (1970); United States v. City of Chicago, 663 F.2d 1354 (7th Cir. 1981) (en banc); Firefighters Institute v. City of St. Louis, 616 F.2d 350, 364 (8th Cir. 1980), _cert. denied_, 452 U.S. 938 (1981); United States v. Ironworkers Local 86, 443 F.2d 544, 553-554 (9th Cir.), _cert. denied_, 404 U.S. 984 (1971); United States v. Lee Way Motor Freight, Inc., 625 F.2d 918, 943-44 (10th Cir. 1979); Thompson v. Sawyer, 678 F.2d 257, 294 (D.C. Cir. 1982).

17. EEOC v. Local 638, 36 F.E.P. Cases 1466, 1477 (2nd Cir. 1985); Vanguards v. City of Cleveland, 36 F.E.P. Cases 1431, 1437 (6th Cir. 1985); _see also_ Deveraux v. Geary, 36 F.E.P. Cases 415, 418-19 (D. Mass. 1984).

18. Washington v. Davis, 426 U.S. 244-45 (1976). Justice White's treatment of the Court of Appeals precedent in _Washington v. Davis_ is in marked contrast to the absence of any mention of that precedent in _Stotts_.

19. 431 U.S. 324, 346 n.28 (1977).

20. See for example, letter to Mr. Lloyd M. Harmon, Jr., County Counsel of San Diego from Wm. Bradford Reynolds dated, January 11, 1985.

21. Syracuse Post Standard, March 23, 1984, p. 1, 4.

22. Affirmative Action to Open Doors of Job Opportunity, Report of the Citizen's Commission on Civil Rights (June 1984) at 128.

23. See U.S. v. San Diego County, Transcript of Hearing on Defendant's Motion to Dissolve the Consent Decree, March 7-8, 1983 at 87.

24. See notes 16 and 17 supra.

25. U.S. v. San Diego County, Transcript of Hearing, note 23 supra at p. 12.

26. Mindberg, Elliot M., "A Thousand Days of Silence," Human Rights, ABA, Winter 1984 Col. 11, No. 3, p. 20.

27. Department of Justice Case Docket for Complaints Filed 1/20/77 through 1/19/81.

28. Department of Justice Case Docket for Complaints Filed 1/20/81 through 3/16/84.

29. Id.

30. Id.

31. Budget Analysis of the Civil Rights Division Fiscal Year dated 10/20/83, p. 181.

32. Fiscal Budget Report of the Civil Rights Divisions dated October 20, 1984 for the Fiscal Year 1986, p. 181.

33. In fact, the Starrett City Project had been receiving Federal subsidies from HUD with its full knowledge and acceptance of the policies used to maintain housing integration. Thus,

two of the Division's major cases clearly contravene past federal policies and do not attack those who continue unlawful segregationist policies.

34. U.S. v. Pelzer Realty Co., Inc., 484 F.2d 438 (5th Cir., 1973), *cert. denied*, 416 U.S. 936 (1974); U.S. v. City of Black Jack, 508 F.2d 1179 (8th Cir., 1974), *cert. denied*, 422 U.S. 1042 (1975); Resident Advisory Board v. Rizzo, 564 F.2d 126 (3d Cir., 1977), *cert. denied*, 435 U.S. 980 (1978); Metropolitan Housing Development Corp. v. Village of Arlington Heights, 558 F.2d 1283 (7th Cir., 1977), *cert. denied*, 434 U.S. 1025 (1978); Robinson v. 12 Lofts Realty, 610 F.2d 1032 (2d Cir. 1979); Betsy v. Turtle Creek Associates, 736 F.2d 983 (4th Cir., 1984); Smith v. Town of Clarktown, N.C., 682 F.2d 1055 (4th Cir., 1982); *see also* U.S. v. Youritan Construction Co., 370 F. Supp. 643 (N.D. Ca. 1973); *aff'd in part*, U.S. v. Youritan Construction Co., 509 F.2d 623 (9th Cir., 1975); Malone v. City of Fenton Mo., 592 F. Supp. 1135 (E.D. Mo. 1984); Angel v. Town of Manchester, 3 Eq. Op. Housing Rptr. ¶ 15,398 (D. Conn. 1981); U.S. Housing Auth. of Chickasaw, 504 F. Supp. 716 (S.D. Ala. 1980).

35 U.S. v. City of Birmingham, Mich., 727 F.2d 560, (6th Cir., 1984).

36. U.S. v. City of Birmingham, 538 F. Supp. 819, 827 (E.D. Mich., 1982) n.9. See also 727 F.2d 565-6.

37. Angell v. Zinuser, No. 790229 (D. Conn. Oct. 14, 1981).

38. "Reagan Civil Rights: The First Twenty Months," Report by the Washington Council of Lawyers, p. 22.

39. Reynolds, Wm. Bradford, "The Civil Rights Establishment is All Wrong," Human Rights, ABA Journal, Vol. 12, No. 1, Spring 1984, p. 37-38, n.8.

40. 528 F.2d 867 (6th Cir., 1975), _vacated_ _and_ _remanded_, 429 U.S. 1068 (1977), 558 F.2d 350 (6th Cir. 1977), _cert._ _denied_, 434 U.S. 985 (1977).

41. 509 F.2d 110 (2d Cir. 1975).

42. 610 F.2d 1032 (2d Cir. 1979).

43. _Id_. at p. 1036-38.

44. _Id_. at note 10 p. 1037-38.

45. Ablemarle Paper Co. v. Moody, 422 U.S. 405, 431 (1975).

46. Testimony of the Lawyers' Committee for Civil Rights Under Law on Recent Efforts of the Administration to Alter the Effect of Title VII of the Civil Rights Act of 1964 Before the Subcommittee on Employment Opportunities of the House Committee on Education and Labor, December 14, 1984 at 11-12.

47. N.Y. Times, Dec. 3, 1984 at B10.

48. _Id._

49. Washington Post (December 4, 1984).

50. _See_ Testimony, note 47 _supra_, Attachment A.

51. Lau v. Nichols, 414 u.S. 563 (1974). See memorandum of Timothy Cook, Attorney Civil Rights Division to William French Smith, Attorney General p. 23 (hereinafter "Cook" memorandum).

52. See Memorandum for the United Staes as Amicus Curiae, in Guardians v. Civil Service Commission of the City of New York (2nd Cir.) filed August 20, 1980.

53. See Memorandum from Reynolds to the Solicitor General dated May 24, 1982 and accompanying propsed Supreme Court brief cited in the Cook memorandum note 52 at 24.

54. Guardians v. Civil Service Commission of the City of N.Y., 103 S. Ct. 3221 (1983)

55. See Days, Turning Back the Clock: The Reagan Administration and Civil Rights, 19 Harv. Civ. Rts. Civl. Lib. L. Rev. 309, 337-9 (1984). Mincherg, A Thousand Days of Silence, 11 Human Rights 18 (1984).

56. Cook memorandum note 52 at 29.

57. In a related area, the Justice Department refuses to utilize a key presumption which shifts the burden of proof at trial to a defendant school district where purposeful discimination is shown. Keyes v. School District No. 1, 413 U.S. 189 (1973). Mr. Reynolds response is obfuscatory--namely that the Department uses the Keyes presumption at the trial stage but not at the investigative stage. Reynolds, The Civil

Rights Establishment is All Wrong, 12 Human Rights 34 (1984). What this means is that the Department will not bring cases where the Keyes presumption should be utilized, but will utilize the presumption at trial if necessary. This position in effect undermining the Keyes case by simply refusing to bring cases based on the law of that case. Again, as with the testing area, the Justice Department is undermining established law by simply not bringing cases based on the law.

58. Howard Professor Raoul Berger argues persuasively in his scholarly work, Impeachment: The Constitutional Problems (1973) that the phrase "other high Crimes and Misdemeanors" contained in Article II, Section 4 of the Constitution is not limited to violations of the criminal law at 53-102. See also C. Black, Impeachment: A Handbook 39-40 (1974). Certainly gross derelictions of duty could qualify as an impeachable offense.

NATIONAL CONFERENCE OF BLACK MAYORS
RESOLUTION ON AFFIRMATIVE ACTION

Whereas, the 1968 Kerner Commission Report found this nation moving in two directions, one White and one Black, resulting in widespread racial discrimination; and

Whereas, the effects of racial discrimination in public sector employment creates the underrepresentation of Blacks, Latinos and women in job opportunities; and

Whereas, affirmative action goals and timetables utilizing race or sex-conscious measures have proven to be the most successful remedy in reducing racial and sexual discrimination in employment; and

Whereas, Congress intended the use of race and sex-conscious measures as a permissible remedy for employment discrimination in enacting Title VII of the Civil Rights Act of 1964; and

Whereas, courts have further permitted race and sex preferences as a remedy for employment discrimination under the equal protection clause of the Fourteenth Amendment to the United States Constitution; and

Whereas, the United States Supreme Court decision in Memphis v. Stotts last spring, 1984, allowed the City of Memphis to reduce its fire and police personnel due to budgetary restraints pursuant to a seniority plan, even though the action reduced the number of minorities hired under a court-approved settlement, affirmative action plan; and

Whereas, Attorney General, Edwin Meese, and Assistant Attorney General for Civil Rights, W. Bradford Reynolds, have broadly and wrongly interpreted the Memphis v. Stotts decision to outlaw all affirmative action plans with numerical goals and quotas; and

Whereas, since Memphis v. Stotts, every court has rejected the interpretation offered by the Justice Department, and instead, upheld the legality of affirmative action plans; and

Whereas, neither the Equal Employment Opportunities Commission (EEOC), the statutorily authorized chief interpreter of Title VII, nor the Supreme Court have decided whether any circumstances prevent a public employer from using goals and quotas in hiring and promotions; and

Whereas, the Justice Department previously intervened in cases and filed briefs urging the court to modify existing court orders to end numerical goals and timetables; and

Whereas, the Justice Department recently sent 56 cities letters inviting them to join the Department in going to court to terminate the affirmative action orders in those cities, requiring the hiring or promotion of minorities and women in law enforcement and other public employment positions; and

Whereas, the actions of the Attorney General and the Justice Department deny Blacks, Latinos and women the most fundamental rights secured by the Constitution and laws of the United States to equality, fair employment opportunities and an effective remedy for the past and present effects of discrimination in employment.

Now Therefore Be It Resolved:

1. That The National Council of Black Mayors acknowledges the success and legitimacy of race and sex-conscious affirmative action with numerical goals and timetables as a remedy for effects of past and present discrimination; and

2. That we urge our colleagues in this association as well as all mayors to reject invitations from the Justice Department, and to actively oppose the government efforts to eliminate court-approved affirmative action plans for hiring and promoting minorities and women; and

3. That we believe the actions of the Reagan administration will definitely reduce the level of minority and female hirings and promotions in public employment and create enormous practical and political problems.

Prepared for the adoption by the National Conference of Black Mayors at its Annual Meeting in Hartford, Connecticut, April 17-20, 1985.

National Conference of Black Lawyers
Center for Constitutional Rights
National Lawyers Guild

By: Professor John Brittain
University of Connecticut Law School

Frank Deale
Center for Constitutional Rights

April 18, 1985

Adopted Unanimously

Senator **Mathias**. In addition to Mr. Podesta, we have Mr. Walters and Mr. Roy Innis.

Are there any other witnesses in the room who wish to testify with respect to the confirmation of William Bradford Reynolds?

The Chair observes none, so I will ask the witnesses now at the table to rise and raise your right hands.

[The witnesses are sworn.]

The record will show that the witnesses have been duly sworn.

Mr. Podesta, you have been waiting the longest, so we will start with you.

TESTIMONY OF PANEL OF WITNESSES INCLUDING ANTHONY T. PODESTA, PRESIDENT, PEOPLE FOR THE AMERICAN WAY, WASHINGTON, DC; ROY INNIS, NATIONAL CHAIRMAN, CONGRESS ON RACIAL EQUALITY, NEW YORK, N Y; RONALD WALTERS, HOWARD UNIVERSITY, ON BEHALF OF JESSE JACKSON, PRESIDENT, NATIONAL RAINBOW COALITION

Mr. **Podesta**. Thank you very much, Senator Mathias.

Senator **Mathias**. At least waiting longest at the table; I'm not sure who is waiting longest in the room.

Mr. **Podesta**. My name is Anthony Podesta, I am the president of People for the American Way, a 150,000-member organization, liberals and conservatives, united in support of the Constitution of the United States.

We have submitted testimony for the record here today, but I would just like to highlight a few points in my oral testimony.

Senator **Mathias**. Let me rule at this time that the full statements of all witnesses will, without objection, be included in the record.

Mr. **Podesta**. Thank you. We asked to testify before this committee to urge the Senate to conduct a searching inquiry into Mr. Reynolds' plans for carrying out what we believe to be his most important duty should he be confirmed as Associate Attorney General.

The Associate Attorney General of the United States would be responsible for the Office of Legal Policy of the Department of Justice, the office which is deeply involved in selecting all of our Federal judges. The Associate Attorney General also sits on the President's Committee on Federal Judicial Selection.

With one-seventh of the Federal bench currently vacant, Mr. Reynolds will play a pivotal role should he be confirmed in selecting candidates for the Supreme Court and lower Federal courts. The judges that he will be involved in selecting will sit for decades after he leaves the Department of Justice.

Of late there have been suggestions from public officials, from private religious and political groups, that judges should pass some sort of religious or ideological litmus test or get some kind of ideological security clearance, reminiscent of other eras in American history.

Today's question seems to be: Are you now or have you ever been a member of Planned Parenthood? The demand that seems to be being made is would you be prepared to promise to rule our way once you sit as a Federal judge.

I should make clear that we are not troubled by conservatives, strict constructionists, Republicans being involved in the selection of judges, but I think what is happening is something very different from that.

We are concerned to learn Mr. Reynolds' views and plans for tests and inquiries for judicial candidates into specific legal cases and issues. As Mrs. Justice O'Connor told this committee when she was before you for confirmation, demanding to know a judicial candidate's position on cases that may come before the courts is tantamount to demanding that cases be prejudged, an attack on the very essence of justice and an impartial judiciary.

We are especially concerned about Mr. Reynolds' views and plans for inquiries into the personal and religious beliefs of judicial candidates. Demanding to know a judicial candidate's beliefs relating to the existence of a supreme being or the beginning of life verges on a religious test for public office, something explicitly prohibited in article VI of the Constitution.

And so we urge the committee to have Mr. Reynolds reaffirm the principle that the oath of judicial office is one to the Constitution, not to some sectarian or ideological platform

We urge the committee to have Mr. Reynolds' views on article III, independent impartial judiciary, before you, and on the article VI ban on religious tests.

People for the American Way believes that article III and article VI are both very much threatened in the current climate and very much believe that each of those articles of the Constitution is worthy of respect.

Thank you very much.

[The following was received for the record:]

NEWS FROM

People For The American Way

FOR RELEASE
Tuesday, June 4, 1985, A.M.

For more information, call:
David Kusnet, Sue Vogelsinger,
or Melanne Verveer
(202) 462-4777

PEOPLE FOR URGES 'SEARCHING INQUIRY' INTO JUDICIAL SELECTION

Washington, D.C.

In testimony prepared for delivery today before the Senate Judiciary Committee, Anthony T. Podesta, president of People For the American Way, issued the warning that "ideological extremists are mounting an attack against the independence of the federal judiciary and against the Constitution and the ideals of justice it embodies."

The warning came as the Judiciary Committee opened hearings on the nomination of W. Bradford Reynolds as Associate Attorney General. Podesta urged committee members to "conduct a searching inquiry into the manner in which the federal judicial selection process has functioned during the past four years."

On behalf of People For's 150,000 members, Podesta voiced objection to "the imposition of a stifling ideological conformity, enforced by inquisitorial methods and ideological screening of judicial nominees."

We also ask that you inquire into Mr. Reynolds' conception of the proper functioning of the judicial selection committee upon which he will serve," said Podesta.

If confirmed, Reynolds will sit on the President's Committee on Federal Judicial Selection, the nine-member panel created by President

-more-

Reagan to recommend candidates for federal judgeships and chaired by Presidential Counsel Fred Fielding.

Podesta explained that "we can expect that by virtue of Mr. Reynolds' influence in the Administration his role in the selection of federal judges will extend beyond his position on the committee."

Podesta explained that the ideological screening now being carried out by extremists against judicial nominees is "morally and constitutionally wrong" because it requires nominees to pre-judge specific issues that may come before them. To pass the ideological test, potential judges must indicate that they will not be impartial on such issues as civil rights, abortion, equal rights, and separation of church and state. Such screening, Podesta said, "demonstrates a contempt for the judicial function and a desire to cheapen, politicize and undermine it."

Podesta further charged that the "litmus test that is being imposed extends beyond ideological issues to those which are theological and expressly prohibited by Article VI of the Constitution: a religious test for public office." For example, questions such as those concerning the relationship between "a belief in the existence of a Supreme Being" and the validity of legislation, and inquiries on whether a fetus is a person would screen out adherents of some religions.

Podesta stated that the practice of screening candidates along rigid ideological lines constitutes "a new moral McCarthyism." He explained, "The tactics perfected by Joe McCarthy, such as guilt by association, secret investigations, and character assassinations, are

-more-used to damage nominees. Today's question is, 'Are you now or have you ever been a member of Planned Parenthood?'"

The result of this moral McCarthyism is that "Men and women of exceptional legal experience who have devoted their lives to the rule of law are now being denied the opportunity to serve on the courts because they support groups not approved by the ultra-right extremists," Podesta states.

Podesta cited five examples of highly qualified candidates who were subjected to ideological screening. The first four were either screened out of the nominating process or their nominations were quashed for ideological reasons ranging from ERA to gun control. These are Judith Whittaker, Associate General Counsel for Hallmark Cards; Andrew Frey, Deputy Solicitor General and the federal government's chief advocate on criminal matters before the Supreme Court; William Hellerstein, who was supported by both New York Senators D'Amato and Moynihan and is one of the most highly respected lawyers in New York; Stanley Sporkin, former enforcement chief of the Securities and Exchange Commission and now General Counsel of the Central Intelligence Agency; and Joseph Rodriguez, nominated and confirmed after being forced to submit to an eight-page ideological questionnaire covering his political contributions of $15 or more over the past ten years, and testing his agreement with the ultra-right creed on issues from abortion to the constitutionality of the National Labor Relations Act.

People For the American Way is a 150,000-member national, non-partisan citizens' organization formed to promote the constitutional liberties of all Americans.

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TESTIMONY

OF

ANTHONY T. PODESTA,

PRESIDENT

PEOPLE FOR THE AMERICAN WAY

Mr. Chairman and members of the Judiciary Committee, my name is Anthony T. Podesta. I am the President of People For The American Way, a national, non-partisan citizens' organization formed to promote the constitutional liberties of all Americans.

Our purpose in testifying before the committee today is not to make a direct recommendation with regard to the nomination of W. Bradford Reynolds to be Associate Attorney General. Rather, we are here today to call attention to what will be one of Mr. Reynolds' most crucial duties should he be confirmed, and to seek your assistance in probing how he plans to carry out that duty.

As Associate Attorney General, Mr. Reynolds will sit on the President's Committee on Federal Judicial Selection, a nine-member committee chaired by Presidential Counsel Fred F. Fielding, which has the authority to make federal judgeship recommendations to the President. Moreover, we can expect that by virtue of Mr. Reynolds' influence in the Administration his role in the selection of federal judges will extend beyond his position on the committee.

We ask that the members of the Judiciary Committee employ these hearings to conduct a searching inquiry into the manner in which the federal judicial selection process has functioned during the past four years. We also ask that you inquire into Mr. Reynolds' conception of the proper functioning of the judicial selection committee upon which he will serve.

We will bluntly state the reason for our concern with the actions of this committee. We believe that ideological extremists are mounting an attack against the independence of the federal judiciary and against the Constitution and the ideals of justice it embodies. The continuing independence of the judiciary is critical to our functioning as a just society. By independence we do not mean, nor has it ever been meant to mean, freedom from all restraints and checks - those are an integral part of the system and the legal tradition that has been built over the nearly 200 years of the Constitution. The term, independence, when applied to the judiciary, means political independence. And it is this political independence that is now under attack. In testifying today, we seek to promote the widest possible public debate on this vital issue: the preservation of our nation's independent judiciary.

At the outset, it is critically important to state what we are not objecting to. We are not objecting to a political dimension in judicial selection. We understand that the President won the election, and that with being elected president comes the authority to appoint federal judges. We do not object to the appointment of conservative judges. Whatever one thinks of their judicial or economic theories, certainly no fair-minded person could argue that Circuit Judges such as Robert Bork or Richard Posner are not qualified for the offices they hold.

However, what we do object to, and what we hope that any authentic conservative would also see the danger in, is the imposition of a stifling ideological conformity, enforced by inquisitorial methods and ideological screening of judicial nominees. It is that, not the routine politics of judicial selection, that is unprecedented and profoundly dangerous in the methods of selecting judges employed by some forces in the Executive and Legislative Branch. Judges were not meant to be, and must not be allowed to become, beholden to any particular segment of society or position along the political spectrum.

What we are now witnessing is not politics as usual. By tradition and practice the selection of Federal judges has come to involve a multiplicity of factors and agents that has produced an essentially balanced judiciary, with points of view from all parts of the spectrum represented on the bench. Yet by any objective standard, what is now being proposed is judges committed to undoing vast bodies of law, to throwing out legal precedent, to pre-judging cases not on their merits - the traditional, time-honored way - but on ideological grounds.

Let us take five specific cases drawn from the President's first term. The cases not only demonstrate injustice to good and highly qualified people, but also shed light on the mechanism by which this campaign for ideological purity is functioning:

1. Judith Whittaker: Ms. Whittaker is Associate General Counsel of Hallmark Cards in Kansas City, Missouri. She is a Republican. She was

slated for nomination to the 8th Circuit Court of Appeals in 1981. Despite the fact that she had ranked first in her law school class, and was highly rated by the ABA and the Chief Judge of the Eighth Circuit, her nomination was withheld, under New Right pressure, because, among other things, she had committed the unpardonable sin of supporting the ERA, which was also supported by the Republican Party platform until 1980.

2. Andrew Frey: Mr. Frey is Deputy Solicitor General of the United States and the federal government's chief advocate on criminal matters before the U.S. Supreme Court. He is universally regarded as an excellent lawyer. He was nominated by the President in July, 1984 to serve on the District of Columbia Court of Appeals, DC's equivalent of a state supreme court. The President later withdrew the nomination upon the request of thirteen New Right Senators. Why? They objected to the fact that Frey had made small, personal contributions, on his own time and with his own money, to Planned Parenthood, the National Coalition to Ban Handguns, and the Sex Education Information Council of the United States.

3. William Hellerstein: Mr. Hellerstein is the head appellate lawyer of the New York Legal Aid Society. His candidacy for a federal district judgeship was supported by both Senators D'Amato and Moynihan. One of the most respected lawyers in New York, Hellerstein was rated as "outstandingly able" by 24 former federal prosecutors. However, the President did not nominate him, apparently because of opposition from Joe McCarthy's protege and Chief Counsel during the McCarthy hearings, Roy Cohn, who alerted the Washington New Right "network" to the alleged dangers posed by Mr. Hellerstein's nomination. It was Cohn's conclusion that Hellerstein "wasn't reliable" and had to be eliminated.

4. Stanley Sporkin: Mr. Sporkin is the former enforcement chief of the SEC and is now General Counsel of the CIA. He achieved renown in the Seventies for his vigorous enforcement of the nation's securities laws. He has been nominated for a federal district judgeship by the President, at the request of CIA Director Casey, who is not suspected of being a liberal, but his confirmation is rated as uncertain because of

his past role in enforcing the laws against securities fraud, which evidently offends the New Right.

5. Joseph Rodriguez: Mr. Rodriguez is a former head of the New Jersey Bar Association, and was given the highest rating by the ABA of "exceptionally well-qualified". He is a member of New Jersey Republican Governor Thomas Kean's cabinet. Subsequent to his nomination, in March, 1985, Mr. Rodriguez received a lengthy questionnaire from Senators Hatch, Denton and East demanding to know of his every political contribution of $15.00 or more over the last ten years and whether he agreed with the Right-Wing's creed on a series of issues, ranging from their position that a viable fetus is a "person" to their position that the National Labor Relations Act is of dubious constitutionality. However, in this one instance, the story has a happy ending. Mr. Rodriguez was confirmed after a debate erupted in this committee over the propriety of the questionnaire. The distinguished Chairman of this Committee prohibited the further issuance of such questionnaires behind closed doors. Mr. Chairman, we would suggest that such litmus test inquisitions have no place in the public hearings of the committee either.

We have no reason to believe that these are aberrant episodes in the new world of judicial selection, nor any reason to doubt that this relentless ideological scrutiny will diminish in the coming years, especially as the glittering prize of the Supreme Court may appear to be within reach.

But it is, we believe, very unfortunate that forces in the Executive Branch and the Legislative Branch do not appear to understand the dangers of the path down which they are proceeding for fear of offending some of their most zealous supporters.

I would like to conclude by emphasizing three points about the ideological inquisition:

First, it is morally and constitutionally wrong to subject judicial nominees to an inquisition on specific issues which may come before them as judges before they are confirmed. Pre-judgement subverts the American tradition of an independent judiciary that hears each case without prejudice or political partisanship. Judges are not opinion journalists or politicians. They must judge, by weighing evidence and applying precedents, in specific cases. Anyone who seeks to pin down a prospective judge on how he or she would decide a hypothetical case, in the absence of those specific contending parties which make each case unique, demonstrates a contempt for the judicial function and a desire to cheapen, politicize and undermine it.

Sandra Day O'Connor could not have been appointed under the new rules of judicial nomination and confirmation. During her confirmation hearings, she objected to ideological interviews:

> "I do not believe that as a nominee I can tell you how I might vote on a particular issue which may come before the Court. To do so would mean that I have pre-judged the matter or have morally committed myself to a certain position."

New litmus tests are being given which are completely radical. New Right "judicial reformers" believe that the fundamental freedoms of the Bill of Rights do not apply to the States. Nominees have been asked to endorse the novel doctrine that the First Amendment simply forbids the establishment of a state religion and presumably tolerates other infringements on the separation of Church and State. One exception that they would fashion to freedom of speech would be a ban on "blasphemy". Among other goals, the new inquisitors seek the gutting of the Voting Rights Act, environmental safeguards, and the legalization of censorship, all, ironically, in the name of judicial restraint. The leading New Right judicial reformer is James McClellan. He recently told the John Birch Society:

> "Civil rights" has become " a little tin god on wheels - we do a lot of things in the name of civil rights that have nothing to do with liberty but were in fact part of the agenda of the Marxists of the 19th Century."

Secondly, the litmus test that is being imposed extends beyond ideological issues to those which are theological and expressly prohibited by Article VI of the Constitution: a religious test for public office. The questionnaire referred to views on legislation that is "based on the belief that the conduct proscribed is morally wrong" when such beliefs are based on "a belief in the existence of a Supreme Being." Other questions referred to the personhood of the fetus. Different religious traditions have different viewpoints on the beginning of life. If we were to have uniform standards, it would be tantamount to saying that adherents of some religions would not be qualified to sit as federal judges.

Thirdly, these tactics constitute a new Moral McCarthyism. The tactics perfected by Joe McCarthy, such as guilt by association, secret investigations, and character assassinations, are used to damage nominees. Today's question is, "Are you or have you ever been a member of Planned Parenthood?" If so, you are disqualified from becoming a federal judge. Men and women of exceptional legal experience who have devoted their lives to the rule of law are now being denied the opportunity to serve on the courts because they support groups not approved by the ultra-right extremists.

The people who have mounted this campaign to dominate the judiciary have done damage to our constitutional structure and will do more if they are not reined in by the Administration and by responsible members of Congress, both Republicans and Democrats. In 1928, Justice Brandeis reminded us that:

> "The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding."

It will be instructive to discover what Mr. Reynolds believes about the relevance of this warning to our present situation.

Senator **Mathias**. Thank you, Mr. Podesta.

STATEMENT OF ROY INNIS

Mr. **Innis**. Mr. Chairman, I am Roy Innis. I am the national chairman of CORE, the Congress of Racial Equality.

I am here to speak in support of the nomination of William Bradford Reynolds as Associate Attorney General of the United States.

I assume that the Senate's advise-and-consent duties revolve around primarily technical qualifications and competence and moral fitness of nominees. Too often, and increasingly so, a candidate's philosophy and style comes into play as the central issue. Paradoxically, even candidates ideologically congruent with the Chief Executive of the land, the President of the United States, have been so questioned.

This candidate is in synchronization with the President; the President is certainly, based on last year's election, in synchronization with the American people. This kind of consideration of other than competence and fitness comes when we are dealing with nominees whose position impacts on issues of civil rights. This should not be so. We should get past dealing with people's ideology and deal with people's decency.

I support Brad Reynolds because he is qualified technically, he is competent, he is morally fit, and he is accessible. I know, I have met with him, and we have discussed extensively the civil rights arena of questions. He is perceptive, he is courageous, and I find him to be fair.

My ideological congruence with him is totally irrelevant; only his ideological congruence with the President of the United States, his boss, or with Ed Meese, is relevant.

His record before the Supreme Court in cases he has questioned has been good; he has a fairly good batting average. The fact that I may agree or disagree or wish that the Court had ruled differently on some of those issues is irrelevant. There is no evidence that he has been in violation of law or that he will attempt to refuse to follow the dictates of the courts.

He is concerned, I gathered from my discussion with him, about certain simple varieties of racism, such as reverse racism and what I call reflexive racism. But so am I. That increasingly dangerous subtle kind of racism must be looked at by courageous people who are willing to speak out and question certain kinds of legislation and procedures that in the future could impact negatively on minorities.

I am opposed to the general censorship of anyone who opposed the old ways. There are enough of us, and an increasingly large number of us, who are looking for new ways of dealing with the problems faced by minorities in this country, and one should not have to pass a civil rights litmus test to be qualified as a nominee for a Federal position.

Mr. Chairman, I would like to be able to submit these remarks in an extended form to the committee at some later date.

Senator **Mathias**. I am sure that could be arranged, Mr. Innis. We appreciate your being here.

Mr. **Innis**. Thank you.

STATEMENT OF DR. RONALD WALTERS

Mr. **Walters**. Mr. Chairman, thank you very much, and we would also like to thank Senator Strom Thurmond for approving Reverend Jackson's being here today. I would like to say that Reverend Jackson wanted to be here, but was not able to, and so, as his policy aide, I would like to just read excerpts of his testimony.

Senator **Mathias**. Would identify yourself for the reporter.

Mr. **Walters**. Dr. Ronald Walters, professor of political science at Howard University, and I am representing Rev. Jesse Jackson, president of the National Rainbow Coalition.

He would have said, Mr. Chairman, that he would appear here today to oppose the nomination of Mr. Bradford Reynolds, Assistant Attorney General for Civil Rights, to accede to the third highest post in the Justice Department. He said that he took this position in the knowledge that his able colleagues in the civil rights community have spoken to the specifics of Mr. Reynolds' record, and so he wanted basically to question the vision of Mr. Reynolds and, by extension, that of the administration and the Senate in considering this nomination for such a critical position in the national system of the administration of justice.

He said that Mr. Reynolds has sought, in carrying out the policies of the Reagan administration, to reverse the long legacy of the Justice Department and its Civil Rights Division which has sought to protect the constitutional rights of disadvantaged minorities to achieve a place of security, respect and productivity as American citizens.

To what end has such a policy been perpetrated?

He went on to talk about the genesis of this policy as a bipartisan policy, one which is not the special preserve of any ideological group or any President. He also referred to the Kerner Commission Report, and said specifically that the Kerner Commission Report is relevant, because it was a recipe for reducing the social cost of further indifference to critical problems of the poor and the disadvantaged. Yet it is perhaps one of the most puzzling aspects of the policies of the current administration that a vicious attack upon the instruments of social progress can be planned and executed by Mr. Reynolds and his superiors in seeking to reverse affirmative action settlements and to dilute the institutional application of civil rights protection and other such actions with the expectation that there would be no social cost. He is puzzled at that, that all of this could be done with the expectation that no social cost would be incurred.

What is the vision upon which such an impractical and ahistorical public policy is based?

When the new President came into office in January of 1981, the U.S. Civil Rights Commission sent him a report which said in part:

> The employment status of minorities and women has long lagged significantly behind that of white males. Despite civil rights laws prohibiting discrimination, there is ample evidence that employment and promotional opportunities are not available to minorities and women on an equal basis with white males.

Nevertheless, Mr. Reynolds and his superiors have chosen to kill the messenger and forge a vision of America which returns the social situation to the status quo ante civil rights legislation, which also restores the unchallenged leadership and privileges of white males. While many white males have been in the forefront of the struggle for a humane America, others have a special responsibility to provide some answers to the question of the unavoidable necessity for disadvantaged groups in America to share power and responsibility with them. For it is only when the poor and disadvantaged are empowered that they are able to participate actively in the solutions to their own problems. So, in effect, the civil rights policies followed by the Justice Department under Bradford Reynolds have been ironically designed to continue the "white man's burden," rather than liberating him from that responsibility.

Meanwhile, what appears on the landscape of America is "the great abdication" by many white males, who must accept responsibility for the legacy of civil rights just as they must accept responsibility for many other vexing economic, political and social problems they did not create but which they often perpetuate and may even exacerbate.

Finally, one thing is clear: America cannot remain a democracy in the face of such present and growing disparities between the groups which constitute its basic social fabric, and neither loss of memory nor flight from responsibility will make it possible to avoid the social cost which will be incurred.

Blacks and other disadvantaged groups were kept out of the mainstream of American society as groups, but they are now being asked to come to the bar of justice for restitution as individuals. This is not only unacceptable as policy; it is impractical and ultimately dangerous, since a policy of "color blindness" that denies the validity of unique claims can only serve to lock in the present structural disparities and the continuation of inequality, which erodes hope.

The implication of Mr. Reynolds' vision is that there will occur no social cost as a result of the historic denial of opportunity, and if this interpretation is incorrect, then others must justify his peculiar tenure and function as Assistant Attorney General against civil rights. The sum total of his activities should be considered repugnant to those who believe in freedom and human rights in America.

And I, speaking for Reverend Jackson, therefore reaffirm my belief that on this basis he is unfit for higher office.

[The following was received for the record:]

The Testimony of
Rev. Jesse Jackson, President
The National Rainbow coailition

Mr. CHAIRMAN, I appear here today to oppose the nomination of Mr. Bradford Reynolds, assistant Attorney General for Civil Rights, to accede to the third highest post in the Justice Department. I take this position in the knowledge that my able collegues in the Civil Rights community have spoken to the specifics of Mr. Reynolds' record, and so, I want basically to question the vision of Mr. Reynolds and, by extention, that of the Administration and the Senate in considering his nomination for such a critical position in the national system of the administration of justice. Mr. Reynolds has sought, in carrying out the policies of the Reagan Administration, to reverse the long legacy of the Justice Department and its Civil Rights Division which has sought to protect the constitutional rights of disadvantaged minorities to achieve a place of security, respect and productivity as American citizens. To what end has such a policy been perpetrated?

It is a puzzling reversal of the positive legacy of the Justice Department under other Presidents such as John F. Kennedy and Lyndon B. Johnson, who understood that Black people were persecuted by the institution of slavery as a group , since at the time of emancipation 89% of Black people in America were classified as slaves. In addition, they knew that the Federal Govenment participated with the States in the denial of basic group rights for at least 80 years, since it was not until 1941 that President Roosevelt signed an Executive Order granting employment of Blacks in War industries. So, they considered that promulgation of the Civil Rights acts of the 1960s was calculated to reverse the fortunes of a downtrodden group and help them give them the tools with which to compensate for past denials of opportunity and achieve worthwhile social goals.

Mr. Chairman, this has also been a bi-partisan policy of the American Government, because it was Presidents Richard

Nixon and then Gerald Ford who found that it was possible to conceive of a method of setting aside a portion of federally-supported jobs and contracts in the private sector in an effort to assist Blacks and other disadvantaged groups in helping themselves to reach the mainstream of life. And they never conceived of schemes such as destroying affirmative action, or gutting the Voting Rights Act, or completely distorting the concept of equal protection of the laws or compensation for past injustices.

I believe that the concensus they achieved culminated in the recommendations of the Kerner Commission Report of 1969 which, although they have been largely ignored, nevertheless, presented a vision of America as two societies - separate and unequal as the course toward which events would lead if nothing were done. Furthermore, it is important to understand that this Report was written in response to the massive civil disturbances of the 1960s which, at their peak in 1969, saw over 500 major incidents that year where cities were burned, thousands of people killed and incarcerated, and millions of dollars in property was lost. Thus, these recommendations, which called for a substantial attack on the problems of ill-housing, lack of equal education and employment opportunity, lack of social supports for the family, and the like, were a virtual rescipe for movemet toward social harmony and progress which was to be initated by a trilateral partnership of the Federal Government, the private sector and the effected people themselves. It was a rescipe for reducing the social cost of further indifference to the critical problems of the poor and disadvantaged. Yet, it is, perhaps, one of the most puzzling aspect of the policies of the current Administration that a vicious attack upon the instruments of social progress can be planned and excuted by Mr. Reynolds and his superiors in seeking to reverse Affimative Action settlements and to dilute the institutional application of civil rights protection and other such actions, with the expectation that there will be no social costs . What is the vision upon which such impractical and ahistorical public policy is based?

This administration patently has not wanted to face the fact that the situation among the Black population in particular is growing substantially worse by every measure, from average family income and employment, to infant mortality, and that it has an obligation to provide some of the vital leadership to reverse these fortunes. It has not wanted to face the realty that in a booming economy, it policies have contributed to the fact that Black unemployment is still more than 15% and and teenage unemployment of over 50 percent, and in order make significant in-roads into these dire statistics, there needs to be significant federal intervention - not less. They have hidden the fact from the American public that if one looks at the progress of the various groups with respect to labor-force participation, it is whites who have benefitted more from Title VII of the 1964 Civil Rights Act than Blacks.

Neither is education the sole solution to the employment problem, since it is clear that Blacks are paid less than whites at every comparable level of education. In addition, recent indications are that Federal financial aid to education of minorities has been reduced drastically, making it more difficult to acquire a college education. If education rather than Affirmative Action is perceived by this Adminstration to be the answer, then where is the tangible financial support for their belief? We still need Affirmative Action with goals and time-tables, as well as education, and an emphais on voting rights which eliminates the remainng inequities and enables America to be governed by the Rainbow that reflects its population, rather than by an Apartheid arrangement.

When the new President came into office in January of 1981, the U.S. Civil Rights Commission sent him a Report which said, in part: "The employment status of minorities and women has long lagged significantly behind that of white males. Despite civil rights laws prohibiting discrimination, there is ample evidence that employment and promotional opportunites are not availabe to minorities and women on an equal basis with white males." (p. 14.)

Nevertheless, Bradford Reynolds and his superiors have chosen to kill the messenger and forge a vision of America which returns the social situation to the status quo ante civil rights legislation, which also restores the unchallenged leadership and privileges of white males. While many white males have been in the forefront of the struggle for a humane America, others have a special responsibility to provide some answers to the question of the unavoidable necessity for disadvantaged groups in America to share power and responsibility with them. For, it is only when the poor and disadvantaged are empowered that they are able to participate actively in the solutions to their own problems. So, in effect, the civil rights policies followed by the Justice Department under Bradford Reynolds have been ironically designed to continue the "white man's burden", rather than liberating him from that responsibility. Meanwhile, what appears on the landscape of America is "the great abdication" by many white males, who must accept resposibility for the legacy of civil rights just as they must accept it for other vexing economic, political and social problems they did not create, but which they often perpetuate and even exacerbate. To the extent that this generation supports the policies of the current administration in the field of civil rights, it also bears responsibility for the outcome. How can they be expected to continue to accept responsibility for the legacy of Bitberg and deny it for the legacy of slavery and oppression visited upon Blacks and other oppressed peoples in this country? One thing is clear, America cannot remain a democracy in the face of such present and growing disparities between the groups which constitute its basic social fabric , and neither loss of memory nor flight from responsibility will make it possible to avoid the social cost which will be incurred. Blacks and other disadvantaged groups were kept out of the mainstream of American society as groups , but they are now being asked to come to the bar of justice for restitution as individuals . This is not only unacceptable as policy, it is impractical and ultimately dangerous, since a policy of "color-blindness" that denies the validity of unique claims can only serve to lock-in the present structural disparities, and the continuation of inequality erodes hope. The only basis for denying unique claims is that we have already achieved the fact of equality, an assumpion which we know to be false on its face.

The implication of Mr. Reynolds' vision is that there will occur no social change as a result of the historic denial of opportunity, and if this interpretation is incorrect, then others must justify his peculiar tenure and function as Assistant Attorney General against Civil Rights. The sum total of his activites should be considered repugnant to those who believe in freedom and human rights in America, and I, therefore, reaffirm my belief that on this basis he is unfit for higher office.

Senator MATHIAS. Thank you very much, Dr. Walters.

Let me turn to the chairman of the committee to see if he has any questions.

The CHAIRMAN. Thank you, Mr. Chairman. Dr. Walters, I am glad we could arrange for you to be here, when Dr. Jackson called me and said he couldn't come and he would like for you to represent him. We are very pleased to have you, and thank you for coming.

Also I would like to thank Mr. Innis here for his testimony and for his presence, and, Mr. Podesta, we thank you for your testimony—and this gentleman, I didn't catch your name, I came in late.

Mr. BOYD. Yes, I am Cyril Boyd; I am Mr. Innis's aide.

The CHAIRMAN. Oh, you are just with Mr. Innis. Well, we appreciate the testimony of all you people who have taken your time to come here and express yourselves. I am glad we live in a country where we can do that. I am glad we can have our dissent, and I am very pleased that we have freedom of speech in this Nation, and I have allowed more witnesses to testify on this nomination than any I think since I have been chairman here, and more than any in the 31 years I have been here I think on any one nomination. We wanted to have full and complete testimony from every source and every philosophy and every individual, especially if he is representing a group, to express himself.

And I just want to express my thanks to all of you who came and expressed yourselves on this nomination.

Senator **Mathias**. Thank you, Mr. Chairman. I think all of you have stated your positions with great clarity and I have no further questions.

Mr. **Walters**. Mr. Chairman, could I make just one further brief remark that I just recalled?

Senator **Mathias**. Surely.

Mr. **Walters**. And it happens to relate to Reverend Jackson's campaign, and it had to do with the second-primary issue. I recall having had extensive discussions with Mr. Reynolds on one occasion with respect to the second-primary issue, and it had to do with the fact that the Justice Department had made a study of this matter. We asked then, and we are still asking today, for that study to be made public; it's been embargoed too long. We think in fact that the Justice Department did find very serious denial of the impact of voting rights in the South as a result of second primaries. And so we are calling now, almost a year later, for the release of that report and for action by the Justice Department.

And we think it really is a part of the continuing scenario of what we have seen in Mr. Reynolds, that he has refused to move on this very important problem.

Senator **Mathias**. I will make an inquiry.

Mr. **Walters**. Thank you, Senator.

Senator **Mathias**. Mr. Innis?

Mr. **Innis**. Mr. Chairman, I feel obliged to make a slight response to that, since that issue of the second primary is so critical and is still in open debate in some quarters in the black community.

There are those of us who feel that the second-primary approach politically is not necessarily a discriminatory tool; in fact, there are those of us who feel it can be of great help to minorities.

I assume from the testimony of the speech made by Andrew Young, a Democrat, at the Democratic National Convention, in support of the second primary, is completely in line with the statements they are making here.

So I would like that, too, to be appended to Dr. Walters' statement.

Senator **Mathias**. We've heard you. Thank you.

Mr. **Walters**. I would just say again, Mr. Chairman, that we just ask that the study be made public; I didn't attempt to defend second primaries.

Senator **Mathias**. I understand. We will make an inquiry.

Mr. **Walters**. Thank you.

Senator **Mathias**. Thank you all. I will now ask the chairman if he wants to resume the Chair.

The **Chairman** [presiding]. You are about through, aren't you?

Senator **Mathias**. We would just recess, subject to the call of the Chair.

The **Chairman**. We have allowed everybody a chance to be heard.

Is there anybody else here today who wants to be heard on this nomination?

I think we have afforded the opportunity to everyone.

I wonder if Mr. Reynolds cares to respond.

[The Chairman consults with staff.]

I understand Mr. Reynolds does not care to respond to any of the statements, so therefore the hearing on the nomination is now closed.

We will meet tomorrow; the nomination will be on the agenda. I imagine somebody will carry it over a week, which they have a right to do, any one Senator, and that will give more consideration, if that is desired.

And I again want to thank all of you for your participation. I want to thank Senator Mathias for assisting in the hearing, and the able Senator from Utah, Senator Hatch, for conducting some of the hearings, and the ranking member, Senator Biden, and those on the Democratic side, for participating, as well as some on the Republican side—and Senator Metzenbaum, who was active in the hearing, too.

We appreciate the courtesies of all of you, and I am very pleased that we have afforded a full opportunity for everyone to express himself on this important nomination.

If there is nothing else now, Mr. Chairman, I guess we can adjourn.

Thank you very much.

[The committee adjourned at 5:58 p.m.]

Mr. Wolfson. And it happens to relate to [illegible]

[illegible]

Senator McClellan. [illegible]

Mr. Wolfson. [illegible]

[illegible]

NOMINATION OF WILLIAM BRADFORD REYNOLDS TO BE ASSOCIATE ATTORNEY GENERAL OF THE UNITED STATES

TUESDAY, JUNE 18, 1985

United States Senate,
Committee on the Judiciary,
Washington, DC.

The committee convened, pursuant to notice, at 10:06 a.m., in room SD-226, Dirksen Senate Office Building, Hon. Strom Thurmond (chairman) presiding.

Present: Senators Thurmond, Biden, Mathias, DeConcini, Heflin, Simon, Laxalt, Hatch, Grassley, Denton, McConnell, Kennedy, Specter, and Metzenbaum.

Also present: Duke Short, chief investigator; Frank Klonoski, investigator; Joe Kopka, investigator, and Ruth Lucas, investigative clerk.

OPENING STATEMENT OF CHAIRMAN STROM THURMOND

The Chairman. The committee will come to order.

After the completion of the hearings on the nomination of William Bradford Reynolds to be Associate Attorney General of the United States, I received a letter from the distinguished ranking member of this committee, Senator Mathias, expressing concern over statements made by some of the witnesses who testified in opposition to the nomination. Senator Mathias felt that Mr. Reynolds should be invited to return to the committee to discuss these matters.

Therefore in an effort to be fair to all concerned, and to allow Mr. Reynolds an opportunity to clarify any misunderstanding, I scheduled today's hearings.

I am satisified that during the previous 2 days of hearings, Mr. Reynolds answered all questions posed to him in a forthright and articulate manner, and I am confident he will do the same today.

Mr. Reynolds, would you stand to be sworn again, please?

Will the testimony you give in this hearing be the truth, the whole truth, and nothing but the truth, so help you, God?

Mr. Reynolds. Yes.

The Chairman. Be seated, please.

The distinguished Senator from Alabama, do you have any opening statement you would like to make?

Senator Heflin. No, sir; I am here to listen.

The Chairman. The distinguished Senator from Pennsylvania?

Senator **Specter**. Thank you, Mr. Chairman. I have no opening statement.

The **Chairman**. I would like for Senator Mathias to be here, so we will take a few minutes' recess, since this hearing was called at his request to clarify matters that were previously brought out.

[Short recess.]

The **Chairman**. The committee will come to order.

Senator Mathias, I made a very brief statement that this meeting was called at your request, and Mr. Reynolds is here to answer any questions now.

I have a few questions I might propound to him.

Senator Mathias, do you have an opening statement?

OPENING STATEMENT OF SENATOR CHARLES McC. MATHIAS, JR.

Senator **Mathias**. Yes, Mr. Chairman. During the hearings 2 weeks ago, the committee examined Mr. Reynolds at some length and was able to explore with him in some detail several of the issues surrounding his stewardship of the position he now holds as Assistant Attorney General for the Civil Rights Division.

As you will recall, it was following his testimony that several public witnesses representing civil rights organizations, local governments, and other interested parties were permitted by you to present brief oral testimony and to submit more extensive views for the record.

Although you invited Mr. Reynolds to respond at the time, he did not see fit to do so. As a result of this proceeding, it was in my judgment that the committee was left in a somewhat unsatisfactory position. In some cases, the testimony of the public witnesses contradicted Mr. Reynolds'. In other cases, the public witnesses made charges against Mr. Reynolds' discharge of his duties without affording him an opportunity to respond.

At the conclusion of those first 2 days of hearings, it seemed to me important to clarify and complete the record. I am grateful to the chairman for having invited Mr. Reynolds back in order to do just that.

I look forward to hearing the nominee's response to the questions and issues that have been raised, and I look forward to the prospect of disposing of this nomination based on a full and complete record.

I thank you, Mr. Chairman, for making that possible.

The **Chairman**. Senator Metzenbaum, do you have an opening statement?

OPENING STATEMENT OF SENATOR HOWARD M. METZENBAUM

Senator **Metzenbaum**. I do, Mr. Chairman.

Mr. Chairman, I want to say at the outset that one of the reasons I want to make an opening statement has to do with the President's use of the radio time this past Saturday to attempt to convince the people of this country that the issue in connection with the Reynolds confirmation has to do with the issue of quotas and busing. That just is not the fact. That is not the reason that some of us on this committee have such strong reservations as we do about confirming Mr. Reynolds.

The first hearing on this nomination was one of the most disturbing hearings I believe I have ever attended. We heard testimony about blatant racial gerrymandering of congressional districts, which Mr. Reynolds's approved; about white officials moving a polling place with the clear purpose of reducing voting by black citizens, which Mr. Reynolds approved; about efforts by black parents to intervene in a lawsuit to protect their children's rights, which Mr. Reynolds opposed. The list goes on and on.

In each of the cases, Mr. Reynolds ignored the complaints of the minorities of this country and decided against them.

It is not a matter, Mr. President, of bussing and quotas. It is a matter of Mr. Reynolds' dedication to the laws of this land, and their enforcement. I think it is fair to say that the victims of discrimination—black Americans, and Americans of other racial minorities, and women's groups are outraged, and I do not want to overlook the issue of the handicapped Americans and the case in Oklahoma, where Mr. Reynolds, according to the Oklahoma papers, refused to be involved in connection with the death of an institutionalized child, and according to the Oklahoma paper, was quoted as saying that one death does not provide sufficient basis; if there had been 10, we might intervene. And as a consequence, there is a sense of outrage at the conduct of the man we have before us today for confirmation.

Americans of every minority group have a feeling that Mr. Reynolds has abandoned them, and that he has ignored or distorted the laws that Congress enacted to protect them.

In fact, when the committee examined the record, it became clear why the disadvantaged of this country feel the way they do about Brad Reynolds. As I said previously, and I have said publicly in the media, Mr. Reynolds is an intelligent man. I do not believe him to be a racist. I do not believe him to be a bigot. But the fact is that he has his own vision of the way the law should be, and he is willing to zealously pursue that vision regardless of what Congress intended and what the courts have said.

When the President spoke, I think that he was unfamiliar with the record and the facts in connection with this matter. Obviously, the President of the United States did not attend this hearing. But the record was clear, and those who represent him certainly know, that what took place in this committee hearing did not deal with Mr. Reynolds' position with respect to the matters of quotas and busing. The documents and the evidence in this case would indicate that the issue is Mr. Reynolds' refusal to ignore the law of the land because it does not fit his personal ideology. The President has his right to have his man or his woman in positions of responsibility, but the right of the U.S. Senate is to advise and consent, and that is a strong responsibility placed upon us.

This Senator has never believed that he should vote against confirming any particular individual because I did not agree with that individual's political philosophy. This Senator has very strong reservations and concerns when an officer of the law does not support and see to it that the laws of this country are enforced. That, to me, is one of the major issues that is before us today.

Thank you, Mr. Chairman.

The CHAIRMAN. The distinguished Senator from Nevada.

OPENING STATEMENT OF SENATOR PAUL LAXALT

Senator **Laxalt**. I thank the Chairman.

Mr. Chairman and my colleagues, I have little to add to my previous statement, detailing Mr. Reynolds' qualifications to serve the Attorney General and the President who have selected him.

I am, of course, most interested in the testimony that we will receive today. It seems to me, however, that the substance of our earlier hearings confirms both that Mr. Reynolds is dedicated to righting the wrongs done individuals who have been discriminated aqainst on account of race, color, sex, national origin or condition of handicap, and that he is equally determined to oppose the imposition of some sort of caste system in this country under which groups of people would automatically be preferred or slighted on the basis of those same characteristics.

It is my opinion, Mr. Chairman, from reviewing the transcript and participating in the hearings thus far, that some of the opposition by certain of my colleagues, both on this committee and on the floor, is not based upon the competence of this man; rather, I think that the opposition is deeply philosophical. In advancing civil rights for individuals while fighting the insidious notion that our society must devolve into a class-based hierarchy of preferential treatment, Mr. Reynolds just conforms to the national consensus. Despite the cries of some that our civil rights laws should protect only certain discrete groups, Brad Reynolds has championed the proposition that these laws are meant for all Americans. In this regard, Roy Innis, of the Congress of Racial Equality, is correct in noting that, "This nominee is in synchronization with the President, and the President, based on last year's election, is certainly in synchronization with the American people."

In following this nondiscriminatory mandate, which our Nation has gained only after long travail, including a bloody civil war, Mr. Reynolds is also following the law. And that is rather important in our consideration here, I would think.

The words of our colleague Senator Hubert Humphrey in describing his landmark employment discrimination bill are familiar, but I think they bear repeating. He said:

> There is nothing in [the bill] that will give any power to the Commission or to any court to require hiring, firing or promotion of employees in order to meet a racial 'quota' or to achieve a certain racial balance. That bugaboo has been brought up a dozen times; but it is nonexistent.

I know that some argue with Mr. Reynolds' opposition to hiring and layoff quotas and with his preference for using remedies other than forced busing to integrate schools. Such disagreement should not bar Mr. Reynolds from office, in my opinion.

Given the volume of cases filed, and matters reviewed by the Civil Rights Division over the last 4 years—and the numbers are huge—I myself have disagreed with some of Mr. Reynolds' decisions in individual instances, and I have voiced those questions. I am convinced, however, of the sincerity of his purpose, and that is very important here, of his skill as a lawyer—and I think that is unquestioned among fair-minded people—and of the wisdom of his guiding policy against race or sex-conscious discrimination.

I therefore await, Mr. Chairman, Mr. Reynolds' testimony today in the hope that he will explain to our satisfaction the alleged ambiguity from his last session here before us, and that we may then proceed, Mr. Chairman, to a favorable vote.

I thank the Chair and my colleagues.

The **Chairman**. The distinguished Senator from Arizona, Mr. DeConcini.

OPENING STATEMENT OF SENATOR DENNIS DeCONCINI

Senator **DeConcini**. Mr. Chairman, I have only a brief statement. I welcome the opportunity and thank the chairman for agreeing to the Senator from Maryland's request for further hearings.

Mr. Reynolds, I am deeply disappointed, actually, in the President of the United States, based on his statement last Saturday, that this is an issue of busing and quotas. It is not, with this Senator. It is an issue of whether or not you have told the truth here. And I hope for your sake and this process, and for the President, that you can explain what I consider very severe not ambiguities, but what appear to be at this moment out and out, bold distortions and untruths that have been told this committee.

Notwithstanding that, this is your opportunity to present the explanation, and I expect there is one, and I hope it is one that will hold you in good stead before this committee, and before the President, who has selected you for this position, and I look forward to listening to your explanation, because I find it most disturbing and I also realize that we all can make errors and have blocks of memories, and I am prepared to listen to those statements and explanations with an open mind.

As I said, Mr. Chairman, I am very disappointed the President feels that this has to be elevated to a national issue of busing and quotas, because this Senator has opposed that for the 9 years that I have been here, almost 9 years that I have been here, and if I vote against this nominee, it is not going to be because of the issue of busing and quotas; it is going to be because of the issue that I do not believe him.

I have no further statement, Mr. Chairman.

The **Chairman**. The distinguished Senator from Alabama, Mr. Denton.

OPENING STATEMENT OF SENATOR JEREMIAH DENTON

Senator **Denton**. Thank you, Mr. Chairman.

I welcome the opportunity to express again my support for William Bradford Reynolds. I continue to believe that he is eminently qualified to be Associate Attorney General of the United States.

In evaluating Mr. Reynolds' qualifications, I find myself echoing the recent words of President Reagan.

> Brad Reynolds is not only a tireless fighter against discrimination. He is a brilliant and dedicated lawyer. He is a man of integrity and strong ideals, whose qualifications and character are impeccable.

Yet despite Mr. Reynolds' unquestionable qualifications, there are still some people, including members of this body and members of the media, who are subjecting Mr. Reynolds to a civil rights litmus test based on the degree of his support for racial goals and quotas. I do not know anyone who questions the legitimacy of using affirmative action goals to provide remedies for actual victims of past discrimination, but one must be careful that racial goals do not engender reverse discrimination, as has sometimes been the case. One must make sure that racial goals are a fulfillment of civil rights, not a denial of them.

I believe Mr. Reynolds has been working toward a fulfillment of civil rights through his enforcement of the laws and by his unswerving commitment to equal justice under the law for all of our citizens. Or to paraphrase the words of the late Dr. Martin Luther King, Mr. Reynolds appears to be working to fulfill a dream that little children will one day live in a Nation where they will not be judged by the color of their skin, but by other factors, such as the content of their character, the degree of excellence, the commitment of their work, and so on.

Mr. Chairman, I commend Mr. Reynolds for his resolute adherence to the principle of true equality in the face of unfair and often personal attack by the proponents of what would in effect be reverse discrimination.

I must say, Mr. Chairman, that I have not always been in agreement with Mr. Reynolds. He is now considering some actions in my own State which I think represent gross examples of reverse discrimination. There may be times in which my judgment would have disagreed with his, in that I thought he made a wrong decision respecting discrimination, rather than reverse discrimination. But in general—which is the only way I think we can judge any man, because no one is going to see eye to eye with any of us on any particular case—I consider his steadfast commitment to the principle of equality of opportunity, his straightforward opposition to reverse discrimination, his opposition to discrimination, and his refusal to wilt or trim his sails on crucial issues when he has analyzed them to the best of his ability—I consider that and his not taking an easier road to escape bitter partisan attacks to be characteristic and desirable in a man for the job to which he has been nominated, and I am proud to support him.

Thank you, Mr. Chairman.

The CHAIRMAN. The distinguished Senator from Illinois, Mr. Simon.

Incidentally, Senator, I understand your wife and mother are here, and we are very pleased to have them, and we welcome you here.

OPENING STATEMENT OF SENATOR PAUL SIMON

Senator SIMON. Well, I thank you for your graciousness, Mr. Chairman.

I have no prepared statement. I would simply join my colleagues, Senator Metzenbaum and Senator DeConcini, in saying the issue is not quotas—and if I may differ with my friend from Nevada, the issue is not a reflection of national consensus. The issue is whether Mr. Reynolds is prepared to vigorously enforce the law in an impartial way, and whether he has been candid before this committee.

In addition to the item that Mr. Mathias is raising questions about, I have one other area that grew out of the last committee hearing that I also want to raise some questions about.

Thank you, Mr. Chairman.

The **Chairman**. The distinguished Senator from Alabama.

Senator **Heflin**. I have no statement, but I have a fourth cousin who is here today. [Laughter.]

The **Chairman**. Would you care to have him stand up? [Laughter.]

Now, in order to be fair to every Senator here, and I think, frankly, most of you have made up your minds—there are some who have not, and I hope you will keep your minds open if you have not—the remaining question here, as I understand it, for this hearing is whether Mr. Reynolds deliberately made falsehoods or whether he forgot something or omitted something or cares to explain his statements.

So in order to be fair, we are going to give each Senator 15 minutes. I will now take 15 minutes and pass on to the ranking Democrat on this side.

TESTIMONY OF WILLIAM BRADFORD REYNOLDS, NOMINATED TO BE ASSOCIATE ATTORNEY GENERAL OF THE UNITED STATES

The **Chairman**. Mr. Reynolds, when you appeared before this committee on June 4, 1985, you were questioned about your involvement in the Mississippi voting rights cases. As part of your response, you said, "I talked to the private attorneys that were involved in those suits."

Subsequently, an allegation was made that your statement was not correct. Mr. Reynolds, did you talk with the private attorneys in this case, and would you clarify this matter?

Mr. **Reynolds**. Certainly, Mr. Chairman.

The **Chairman**. And speak up, so we can all hear you.

Mr. **Reynolds**. If I could just say preliminarily, Mr. Chairman, when I was here before this committee before, I did in fact testify truthfully——

The **Chairman**. Can you talk a little bit louder?

Mr. **Reynolds**. Yes. When I was before the committee before, I did in fact testify truthfully, honestly, and straightforwardly to the very best of my recollection on all matters that were asked of me. I understand that Senator Mathias had indicated there were questions raised, and others have indicated it, and I just want to say to all the committee members that I welcome the opportunity to come back to clear up any of those concerns that have been raised.

The **Chairman**. I do not think people can hear you. Can you pull the microphone closer to you and raise your voice a little more?

Mr. **Reynolds**. Yes. Mr. Chairman, with regard to your direct question, I did testify when I was here before regarding approximately 11 Mississippi cases, that I had not gone into those cases and participated, based on discussions that I had had with plaintiffs' counsel and also with members of my staff, and that is indeed the fact.

The allegation made by Mr. Frank Parker, I believe, who was indeed counsel in some of those cases, was that I had not spoken with him, and that he had discussed the matter with some other attorneys who were involved in those cases, and that they had confirmed that I had not spoken with the other attorneys.

My frame of reference, and what I had in mind, was a discussion—a number of discussions—I had with a man, a lawyer, named Victor McTeer, who was involved in a number of those cases—5 of the 10, I believe. Victor McTeer was one of the lawyers who accompanied Rev. Jesse Jackson and myself to Mississippi around the period of time that we are talking about in June 1983. During that period of time, which was probably the most hectic period we had in the voting area since I have been in the Division, we were considering a large number of election redistrictings by many counties. We were objecting to those on a fairly rapid basis around June.

The real question which was raised was that, after we had objected to them, the counties were threatening to go forward with elections either on the basis of the redistrictings that were objected to, or more of them, many more of them, going forward on the basis of the preexisting districting, which is indeed what is in effect if there is an objection.

The question was whether we would get into those lawsuits—first, whether we would initiate those lawsuits, and there was difficulty from a legal standpoint with whether the Government could initiate the lawsuits.

The other question that was raised was whether we would participate in lawsuits with private plaintiffs. I had a number of discussions with Victor McTeer on whether we would bring the lawsuits or he would bring the lawsuits, and he was urging that we bring them, and I was explaining that we had a lot of problems with the legal theories for us getting into the lawsuits. This was all within a timeframe of about 2 or 3 weeks. When I alerted him that we had problems getting into the lawsuits, the private parties started filing the lawsuits. At that point, there was a question whether we would get in. I looked at our ability to get into the lawsuits, and we actually came in on one of the first ones that Mr. McTeer filed, in Bolivar County. We were surprised when we went down to the hearing, and Mr. McTeer opposed our participation in the lawsuit to the extent that we were arguing on the relief question because we were taking a position different than he was on relief. He was asking the courts to redistrict after they enjoined the elections. We were saying no, the county ought to redistrict and send it back up to section 5 review.

I called Victor, because I was surprised at that after he had opposed our participation on the remedy, and I asked him after he had asked us to come in why he was doing that. Victor said that he was going to win on the liability questions, the section 5 questions, that he really did not need us in there if we were going to oppose him on the remedy questions, and that he would just as soon proceed on these cases without us.

I went back and talked to my attorneys. We all agreed that indeed, the cases that were filed, that were going to get injunctions from the court, they were going to get them momentarily or within 2 or 3 days, and our participation would at that point be disruptive. In addition to that, if we came in, we would have to argue contrary to what the plaintiffs were arguing on relief.

Given that set of circumstances, my determination was not to go into those suits, and my testimony before this committee was an effort to—in rather short form—to respond to the question that was asked me. My response, I believe, is exactly as I have described it, but it was certainly a shorter response.

I did not go in after talking to Victor McTeer, after talking to my attorneys, and after reaching the conclusion that they were going to win on liability. If we went in, we would be disruptive and would have to argue in a different manner on relief, and therefore, we stayed out of the case.

The **Chairman**. Mr. Reynolds, Mr. C.V. McTeer has given the committee a statement for the record which, without objection, will be included. In this statement, Mr. McTeer corroborates that he did indeed talk with you.

[Declaration of Charles V. McTeer follows:]

DECLARATION OF CHARLES VICTOR McTEER

I, Charles Victor McTeer, make the following declaration pursuant to 28 U.S.C. Sec. 1746:

1. I am an attorney practicing in Greenville, Mississippi, with the firm of McTeer & Bailey P.A. I specialize in litigation under the Voting Rights Act, and in this role I was involved in series of cases and related events involving Mississippi county elections in the summer of 1983.

2. I have been informed that these events have become a significant issue in hearings before the Senate Judiciary Committee on the nomination of William Bradford Reynolds to be Associate Attorney General of the United States. This information has come to me by a telephone call from Mr. Reynolds and three (3) members of his staff, as well as by a news story in the Washington Post.

3. I am advised that representations have been made that I agreed that the Department of Justice would not file certain suits challenging county redistrictings within the State of Mississippi which violated the Voting Rights Act and the Constitution of the United States. Because my recollection of the events in question is very different from the foregoing description of these events, I am making

this statement and providing it to the Senate Judiciary Committee, for its consideration as it may see fit.

4. As detailed below, the basic outline of the events of June and July, 1983 is that I was swamped with requests from black voters in many Mississippi counties to insure that their county elections would be held in compliance with the Voting Rights Act. There was no way that I could meet all these requests. I therefore, repeatedly asked Mr. Reynolds to bring lawsuits against these counties. Despite numerous requests and discussions regarding the need to file these suits Mr. Reynolds never advised me that he would take any action. On Thursday, June 13, 1985, Mr. Reynolds telephoned me. I told him in that conversation what I am saying here. I asked Mr. Reynolds to file suits on behalf of the minority residents of the affected counties. The Department took no action. Mr. Reynolds on various occasions explained his reasons for not taking any action as a result of my continued personal pleas for assistance. I did not agree with Mr. Reynolds' refusal to file these actions.

5. I understand according to the Washington Post, June 8, 1985, Page A7, that Mr. Reynolds has testified as follows:

> I talked to the private attorneys that were involved in those suits, as well as having further conversations with my staff, and it was the agreement of all of us that it made no sense for the Justice Department to come into those

> lawsuits, that they were already private actions pending, that we all felt the court's were going to do what was asked in those cases, and that the involvement of the Federal Government at the eleventh hour would probably be more disruptive than productive.
>
> And for that reason, it was agreed by everybody, including the staff that originally recommended I go in, and the private attorneys, that we not go into those lawsuits. And therefore, I declined to file them.

6. To the extent that Mr. Reynolds may be referring to any of my cases the above description is simply not correct. I never agreed that it made no sense for the Justice Department to come into the cases. My repeated requests were made before private lawsuits were filed, and I never agreed with Mr. Reynolds' decision not to bring the suits.

7. It is true that I had several conversations with Mr. Reynolds, and he did explain why he was not going to bring these suits. I made it plain to him, however, that I disagreed with his decision; that I was disappointed; and that I thought that the Justice Department had a responsibility to bring the suits.

8. Mississippi conducts statewide elections every fourth year in the odd numbered year, most recently in 1983. These statewide elections include voting for complete control of county government since each county is run by a five-member Board of Supervisors, all of whom are elected at the same time for four-year terms. The 1983 elections were

especially important because they were the first elections since the 1980 census. Therefore all the counties would have to be redistricted before the election.

9. In numerous counties the 1983 elections were going to be the first opportunity of minorities for a fair redistricting in history. Many of the counties had escaped fair redistricting in the 1970. By 1983, most of the counties had not yet adopted redistricting plans, even though three years had passed since the census. Many counties had undoubtedly hoped that the Voting Rights Act would not be extended so that they would not have to preclear new redistricting plans under Section 5 or they hoped they would escape any form of legal scrutiny as they had so many times in the past. Other counties probably hoped that if time ran out and the election was imminent they would be able to use their existing discriminatory plan. Those counties that did proceed with new redistricting plans were generally following "least change approach", using discriminatory 1970 lines as much as possible and only adjusting where necessary to meet population shifts for the one-person, one-vote requirement.

10. In the spring of 1983 it was clear that a crisis was brewing. By June, a few redistricting plans had been submitted to and reviewed by the Justice Department, and several had been objected to. It was clear that most of the counties were drawing plans that were clearly discriminatory. Many of the counties were just getting

around to drawing and submitting plans, and many had not even done anything.

11. About June 10, 1983, Rev. Jesse Jackson and some of his associates, including me, met with Mr. Reynolds and some of his staff attorneys. We described the crisis, emphasizing that if Mississippi were at last to have fair elections, it would take vigilant efforts by the Justice Department both in continuing to make Section 5 objections for discriminatory redistricting plans, and in following those objections up with lawsuits. We said that we intended to file a number of lawsuits but that they were only a handful of us, not remotely capable of meeting the needs in many counties. We emphasized the time was running short, because the critical first primary was scheduled for August 2, 1983.

12. At the close of the meeting, Rev. Jackson invited Mr. Reynolds to come to Mississippi and see the situation for himself. Mr. Reynolds accepted that invitation, and came to Mississippi the following week, about June 14. For several days a group of us including Rev. Jackson and Mr. Reynolds visited many places in the state. Mr. Reynolds expressed surprise at a lot of what he saw, and he seemed to be interested in vigorous action to insure fair and proper elections.

13. By the time he left, not much more than six weeks remained before the first primary. I expected that the Justice Department would soon be filing a number of

lawsuits, and in anticipation of that I went ahead with just the ones I thought I could handle. In late June, I filed with co-counsel suits challenging county elections in Bolivar and Madison Counties. At the same time I had a number of conversations with Mr. Reynolds and some members of his staff urging him to quickly take some action because of the impending elections.

14. Throughout July the pressure was building for litigative action, but there was still no lawsuits from the Justice Department. In conversations with Mr. Reynolds and his staff I was advised continually that Mr. Reynolds did not agree with the legal theory of stopping otherwise illegal elections. In most cases, the counties that we were discussing had no valid new plans (either because they had not drawn any or because they had drawn one that had been objected to under Section 5). The tactic of these counties was to try to use the existing, discriminatory plan, or to ask the court for a delay while they drew up a new plan. Either of these tactics would be very harmful because they would perpetuate the old plan or even result in no election at all for a long period of time while the white supervisors simple stayed in office. These tactics could be challenged a variety of ways: as violative of Section 5; as racial discrimination in violation of the Fourteenth Amendment or Section 2 of the Voting Rights; or as malaportioned districts in violation of the one-person, one-vote requirement. Mr. Reynolds indicated his view that the

Department of Justice has no authority to bring suits solely on the basis one-person, one-vote malaportionment, but I disagreed with his unwillingness to bring suits under the other, sound approaches noted above, i.e., Section 5, of the 14th Amendment or Section 2. Since these cases clearly involve racial discrimination, it seemed to me that that was precisely the function of the Justice Department.

15. As mid-July approached, Mr. Reynolds made it clear to me that he was not going to file any of these suits. At that point, I had no choice but to give up on the Justice Department and to try to file as many of the necessary suits that I thought I could conscientiously handle. Joined by other local lawyers and with the assistance of a New York based Civil Rights law firm--The Center for Constitutional Rights--I filed suits in approximately 5 Mississippi counties. Moreover, in addition to counties where I or someone else was able to file suit at the last minute, there were other counties where suits should have been filed. If the Department had filed the suits I believe they should have filed, I would have been freed to file additional suits which were necessary and never did get filed. I filed suits in the said counties after the Department of Justice made it clear that they would take no action on behalf of the minority residents of these counties.

16. The Department did move to enter one of the cases, I had already filed, in Bolivar County, as an amicus. In that case there was a question of timeliness of the Section

5 objection of the Department. The Department was allowed by the Court to participate on that issue. The Department wished to address other issues, that I was already addressing, and that the court was about to rule on. Specifically, because of the impending election date and the defendant's failure to provide an appropriate plan my clients were asking the court to draw its own redistricting plan. The Department wished to urge, however, that the county be given another chance to draw up a plan. We opposed that view. We therefore opposed the Department's continued involvement in the litigation after the Court disposed of the timeliness issue.

17. I continued to urge Mr. Reynolds to file suits in the other counties, until he finally made it clear he was not going to authorize such suits. I never agreed that his not filing those suits made any sense. In fact I continue to this day to disagree with his reasoning.

18. On the morning of Thursday, June 13, 1985, Mr.Reynolds called me and said the Senate Judiciary Committee would be expressing some concern about his nomination, and said he would like to go over the details of the 1983 events that I have described above. Three of his staff attorneys were on extension phones. I told him what I remembered at that point, saying, "Brad, I asked the Department for help but you didn't give it". I agreed to look through my files, and he said he would call me back that afternoon at 3 p.m. I did not receive a call back from

him that afternoon and I went out of town about 4 p.m. As far as I know he has not called back yet. On Friday, I was told that a Wall Street Journal editorial that day refers to his conversation with me back in 1983, and implies that our conversation would support his claim that private lawyers in Mississippi agreed with his decision not to file the county suits. I hope that this statement will make it clear that I, at least, never did make such an agreement.

I do declare under penalty of perjury that the foregoing is true and correct.

Executed at Greenville, Mississippi on June 17, 1985.

CHARLES VICTOR MCTEER
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P.O. Box 1835
Greenville, Mississippi
38702-1835
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The CHAIRMAN. On page 6 of the declaration McTeer supplied to the committee, he states:

> In late June, I filed with cocounsel suits challenging 10 elections in Bolivar and Madison Counties. At the same time, I had a number of conversations with Mr. Reynolds.

There is no question that you did speak with Mr. McTeer. However, McTeer's statements seemed to indicate a discrepancy with your testimony in another area. In your testimony, Mr. Reynolds, you have stated:

> I talked to the private attorneys that were involved in those suits, as well as having further conversations with my staff, and it was the agreement of all of us that it made no sense for the Justice Department to come into those lawsuits, that there were already private actions pending, that we all felt that the courts were going to do what was asked in those cases, and that the involvement of the Federal Government at the 11th hour would probably be more disruptive than productive. And for that reason it was agreed by everybody, including the staff that originally recommended I go in, and the private attorneys, that we not go into those lawsuits, and therefore, I declined to file them.

Mr. Reynolds, Mr. McTeer seems to be contradicting you when he states on page 3:

> To the extent that Mr. Reynolds may be referring to any of my cases, the above description is simply not correct. I never agreed that it made no sense for the Justice Department to come into the cases. My repeated requests were made before private lawsuits were filed, and I never agreed with Mr. Reynolds' decision not to bring the suits.

Mr. Reynolds, how do you explain this apparent discrepancy?

Mr. Reynolds. Mr. Chairman, I think that that is accurate. Mr. McTeer and I had long talks and a number of talks about who was going to initiate these lawsuits, and there was disagreement on whether we did, in fact, have any ability, legally, to come in on the fundamental question of the malapportionment of these districts. Indeed, there was also disagreement as to whether it made sense for us to come in under the new section 2, given the time constraints that we were facing in these lawsuits and the rather novel theory that would have to be advanced in that connection.

I think what Mr. McTeer is talking about is that disagreement before any lawsuits were filed. Once the lawsuits were filed and we indeed went down to participate—and Mr. McTeer resisted our involvement in the first one that we did because of a difference on the request for relief, and this was what my testimony had reference to—it was at that point where it was clear that everybody was of the view that we were better off, given the fact they were filed and that they were going to get the injunctions that they were looking at. There was a disagreement on exactly what relief, so it was clear at that point that it made better sense for us to stay out, and that was the point that I was trying to make in my testimony. But I think as to Mr. McTeer's affidavit—I certainly do not have a disagreement with him. He never did agree with my analysis of whether we could or could not initiate these lawsuits in the first instance—except I think we did both agree that where there was a section 5 issue, we could come in, and we did move on some of those. We did not move on the latter ones because of the timing—the injunctions were about to be entered.

I would just add that with regard to this whole matter which took place within the space of no more than 2 weeks of activity, the injunctions were entered as we anticipated within the timeframe of several days after the decision not to go in, and the court, on the relief question, did indeed rule in the manner that we had suggested to Mr. McTeer they would rule, and properly should rule, rather than have the courts order into effect the redistrictings that he had urged.

The Chairman. Mr. Reynolds, does Mr. Hancock of your staff support your position?

Mr. Reynolds. Mr. Hancock and I received Mr. McTeer's affidavit yesterday afternoon, late, and Mr. Hancock was involved in this. In fact, he was the head of my legislation unit in the voting rights section and had been in charge of and has been in charge of these matters from the beginning, and was indeed one of those staff members who initially was urging that we go in and then realized at the 11th hour it would be disruptive. He has prepared a statement that I would like to submit to the committee and have made part of the record that does indeed corroborate my statement as I have made here and the testimony that I originally gave to this committee.

The Chairman. That will be included in the record without objection.

[The following declaration of Paul F. Hancock was subsequently supplied for the record:]

DECLARATION OF PAUL F. HANCOCK

1. My name is Paul F. Hancock. I have been employed by the Civil Rights Division of the Department of Justice since 1970 and have occupied the position of Assistant for Litigation in the Division's Voting Section since 1976. I make this Declaration for submission to the Senate Committee on the Judiciary in connection with the nomination of Wm. Bradford Reynolds for the position of Associate Attorney General. In particular, this Declaration addresses the issue of the proposed Mississippi county redistricting lawsuits that were considered in the summer of 1983.

2. As Assistant for Litigation I have initial supervisory responsibility, under the direction of the Section Chief, for the development and litigation of lawsuits under the Voting Rights Act of 1965, 42 U.S.C. 1973 et seq. As of 1983, approximately 17 attorneys were assigned to the Voting Section to enforce the Act through litigation and a staff of approximately 20 non-attorney professionals was responsible for conducting the factual review of Section 5 submissions. Two additional attorneys were assigned to review and supervise the work of the Section 5 staff.

3. As a result of the large number of redistricting plans submitted for Section 5 review following the 1980 Census we were required to make substantial revisions of our normal method of processing such submissions. For example, 452 redistricting plans were submitted for Section 5 review in 1982 and 386 plans were submitted in 1983. Thus, the Section Chief assigned all attorneys in the Voting Section to assist in the Section 5 review of redistricting plans. The Mississippi county redistricting plans, the great majority of which were reviewed in the first seven months of 1983, were both legally and factually complex and our attorneys participated in the review of virtually all of these plans. With elections scheduled for August 1983 the Mississippi counties were requesting expedited consideration of these plans and to the extent possible we focused our efforts on obtaining a prompt and yet thorough review of the plans. Our records indicate that in early May 1983, twelve attorneys and nine professionals were assigned to analyze one or more of the 32 Mississippi county redistricting plans (including supervisor and justice court districts) that were then under review.

4. During the first six months of 1983 our primary function was to conduct the Section 5 review of the redistricting plans. To the best of our knowledge each Mississippi county that adopted a redistricting plan had submitted the plan for Section 5

review. By the end of June 1983, however, the Section 5 review process had resulted in twelve Section 5 objections to Mississippi county redistricting plans. Our survey of the counties affected by the objections confirmed that most of the counties would not implement, in the 1983 elections, the plans that were the subject of the objections but rather would use the apportionment plans that had been drawn on the basis of the 1970 Census. Each of these plans violated the one-person, one-vote standard of the Fourteenth Amendment, and our analysis of these "pre-existing" plans revealed many of the same racially discriminatory features that led to the Section 5 objections to the post-1980 plans.

5. The scheduled date of the 1983 primary was approaching and thus the lawyers in the Voting Section began considering the possibility of litigation to obtain implementation of racially fair reapportionment plans by the time of the August 1983 primary election. The Chief of the Voting Section was on vacation at the time that these actions came under review and thus I dealt directly with Assistant Attorney General Reynolds. During the month of July 1983, I recommended that the Department initiate litigation against thirteen Mississippi counties pursuant to Section 5 and/or 2 of the Voting Rights Act. The memoranda recommending these actions have been provided to the Committee.

6. At the time that these proposed lawsuits were being considered and developed, I, and other attorneys on our staff, maintained close contact with civil rights lawyers who were involved with the issues and I personally discussed the proposed litigation with Mr. Victor McTeer and Mr. Frank Parker. I also was present on several occasions, when Mr. Reynolds discussed the proposed litigation with Mr. McTeer. I requested our lawyers to maintain close contact with the private attorneys and to identify those counties wherein private litigation might be initiated.

7. Mr. Reynolds expressed no disagreement with our proposals to initiate or participate as amicus in lawsuits presenting an issue under Section 5 (i.e., to enjoin implementation of a plan that has not been precleared under Section 5); thus, he approved our amicus participation in the litigation against Adams and Bolivar counties, and authorized us to initiate a Section 5 lawsuit against Lawrence County.

8. In the latter part of July 1983, I discussed with Mr. Reynolds the remaining litigation proposals, all of which would allege a violation of Section 2. Mr. Reynolds expressed considerable doubt that we would be able to establish a claim

under Section 2 on the basis of the information set out in our memoranda. By the time that Mr. Reynolds and I discussed the Section 2 issue in detail, private lawsuits had been filed against many of the counties that we proposed to sue and we were aware at this point in time that private litigation was imminent in the remaining counties under consideration. Mr. Reynolds noted that the private plaintiffs would prevail easily on the non-racial one-person, one-vote claim (a claim that we have no statutory authority to litigate) and there seemed to be little reason for us to attempt at that time to litigate the admittedly more difficult Section 2 issue. I agreed that the private plaintiffs' one-person, one-vote claim likely would not be contested by the counties and that the district courts would enter the requested injunctions.

9. Mr. Reynolds and I also discussed the relief that would be obtained in these lawsuits. Mr. McTeer, who had urged us to file such lawsuits, opposed our motion to participate in the lawsuit against Bolivar County. I had explained to Mr. McTeer that, in our view, the applicable legal standard required that the county be afforded a brief period of time to redraw the plan and obtain Section 5 preclearance. Mr. McTeer stated that he wanted the federal court to order into effect a plan proposed by plaintiffs. I told Mr. Reynolds that I did not agree with Mr. McTeer's theory because the result would be a plan, whether proposed by black plaintiffs, elected officials, or white citizens (as in the Madison litigation) that escapes Section 5 review. It appeared to me that, as a result of this difference concerning relief, Mr. McTeer did not want us to participate in the private lawsuits in which he was involved. Mr. Reynolds expressed to me his conclusion that the district courts properly would address the relief issue and thus there was no need for participation by the United States. The courts did in fact address the relief issue properly.

10. On June 13, 1985, Mr. Reynolds telephoned Mr. McTeer to discuss some of the events that are described in this Declaration. Other persons who participated in the Department of Justice Section 5 review of Mississippi county redistrictings, or were involved in consideration of the lawsuits, also participated in the telephone conversation. Those persons included Deputy Assistant Attorney General, James P. Turner; Voting Section Chief, Gerald W. Jones; and myself. After discussing the issues in some detail, Mr. McTeer said that he wanted to review his records regarding these matters and that he would telephone Mr. Reynolds at 3:00 P.M. Eastern Daylight Time. I was in my office at 3:00 P.M. to participate in the expected conference call but Mr. McTeer did not call. I again checked with Mr. Turner at approximately 5:30 P.M. and was told that Mr. McTeer had not called.

Pursuant to the provisions of 28 U.S.C. 1746, I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Paul F. Hancock
Paul F. Hancock

Executed on June 17, 1985.

Senator **Metzenbaum**. Mr. Chairman, I would object to that statement being included in the record, since Mr. Hancock is here. If he has a statement to make, I think he should be made a witness and subject to cross examination.

Mr. **Reynolds**. Mr. Hancock is not here, Senator.

Senator **Metzenbaum**. Can't we get him here? Isn't he just down at the Justice Department?

Senator **Hatch**. What is wrong here? What is wrong with his statement? He signed it.

Senator **Metzenbaum**. Because of Mr. Hancock has a statement to make, corroborating something of Mr. Reynolds, then I think we should have an opportunity to inquire of him.

The **Chairman**. There was no objection to Mr. McTeer submitting his statement, was there? Let's treat them all alike.

Senator **Hatch**. What is wrong here? You have got a member of the Justice Department here, signing a statement.

Senator **Metzenbaum**. May we have written questions submitted to Mr. Hancock.

Senator **Hatch**. Certainly.

Senator **Metzenbaum**. Mr. Chairman?

The **Chairman**. If you want to hand the statement up here, I will just read it, then.

Mr. **Reynolds**. It is a rather lengthy statement, that goes through the whole chronology, Mr. **Chairman**.

The **Chairman**. Is it a long statement?

Mr. **Reynolds**. It is.

Senator **Hatch**. Mr. Chairman, may we all have copies of this statement?

The **Chairman**. Well, we can vote on it, if there is any question about it, and permit it in the record. I am amazed that a man from the Justice Department comes up and says he has a statement from one of his attorneys, and the members of the committee would object. But if there is objection, we can vote on it. I am also surprised that a member of the committee is willing to submit other statements and not submit a member of the Justice Department's statement.

Senator **Hatch**. Mr. Chairman, may I ask one question?

The **Chairman**. Yes, you can.

Senator **Hatch**. Is he a career employee and not a political appointee?

Mr. REYNOLDS. He is a career employee, yes, Senator.

Senator HATCH. Then, I do not see any reason why we can't accept his statement.

The CHAIRMAN. Well, I am going to ask the Senator from Ohio how he feels.

Senator METZENBAUM. Mr. Chairman, I have not submitted any statements. Mr. McTeer's statement came in to the Committee, and if you want Mr. McTeer to appear, that is fine with me.

But I think that here we have a question of the credibility of the witness. What we are being asked to do is to accept a statement from an employee, a member of his staff, corroborating that statement without having an opportunity to examine that——

The CHAIRMAN. Would it suit you if we take a recess and let you call Mr. Hancock and see whether or not he made the statement?

Senator METZENBAUM. I do not think that is necessary, Mr. Chairman. I think we should proceed. But I think meanwhile, Mr. Hancock ought to be asked to come up here. It is only 10:30.

The CHAIRMAN. We are not going to ask him to come up here. He has the statement here. If you doubt it, then you call Hancock, and I will recess the committee until you obtain your answer.

Senator METZENBAUM. Let us proceed, Mr. Chairman. I object to it, but you certainly have a right to accept it over my objection.

The CHAIRMAN. Is there any objection on the part of anybody else?

Senator HEFLIN. Well, I think the statement should be introduced. I have not had a chance to read it. I do not know whether it contains language that is in conflict one way or the other. I think that it is premature to judge the statement, until we have had an opportunity to review it.

The CHAIRMAN. We will ask that copies of the statement be submitted to all the members, so they can ask Mr. Reynolds any question about it.

Senator DECONCINI. Well, Mr. Chairman, I think the Senator from Alabama raises a good point, and I agree the statement ought to be submitted here as part of the record. But quite frankly, I also think that if there is any question on anybody's mind that we ought to have an opportunity to question Mr. Hancock.

Senator HATCH. I certainly agree with that.

Senator DECONCINI. I do not know whether there is; I have not seen it.

The CHAIRMAN. Well, suppose we pass the statement around and let you all see it, and we will come back to it later. Will someone pass the statement around?

Senator KENNEDY. So, do I understand, then, that it is not a request that it be put in the record at this particular time, but the Chair reserves the right to offer it at an appropriate time in the record? Is that where we are in terms of the understanding of members of the committee?

The CHAIRMAN. I think this is the first time I have ever had someone object to putting a statement in the record. But we will reserve that right and pass the statement around and let you look at it. And then, after you have looked at it, if anyone has any questions, I think if you could call Mr. Hancock, it would save time, because we have only limited time for this hearing.

Now, Mr. Reynolds, we were discussing this, and we lost 2 or 3 minutes, so I will ask you another question or two here.

The other allegation which has been raised concerns your involvement with the Louisiana redistricting plan. In your testimony on the Louisiana case, you told the committee, "I certainly met with Governor Treen. I met with a large number of representatives of the other side from Louisiana. I met with my staff."

Mr. Reynolds, subsequently, it has been alleged that you did not meet with people who opposed the Louisiana plan. How do you respond to this allegation?

Mr. **Reynolds**. Well, Mr. Chairman, I have gone back, and I have checked my logs on this matter. When I testified to Senator Biden on several occasions regarding the investigation, I had indicated that we had had meetings. Indeed, it turns out that the logs show that representatives of the Louisiana Legislative Black Caucus met with staff lawyers of my section on January 27, 1982, and on February 12, 1982, Senator Nunez, who was endorsing the Nunez plan, and also Senator Hudson met with the staff lawyers. There also were lengthy telephone conversations regarding this matter with Mr. Quigley, who was here to testify, in April of 1982 and, indeed, another conversation with Louise Charmonay, another legislator opposed to the plan. In addition to that, there were extensive written comments that were submitted to the division by attorney Quigley on two occasions, the Legislative Black Caucus on two occasions, and the League of Women Voters. My recollection at the time I testified, Senator—and indeed, I have to say it is also my recollection today—is that I had personally attended a meeting with a group from outside the Department who were opposed to the plan. However, on reviewing the records of my meetings, there is no confirmation of that meeting. What it does show is that I had a number of meetings with outside groups on redistrictings during this time. There were some 15 other statewide redistrictings that we had under review at this time that were active. There were also a large number of county and local city redistrictings that we were reviewing. With regard to those, I was meeting on a fairly heavy and extensive basis, and I think what obviously must be the case is that my recollection with regard to the Louisiana meeting has failed me, and I have confused that with one of the other redistricting meetings.

I will say that I did certainly review this matter extensively. My staff met with outside people, and I met with my staff on three occasions. We had one meeting that was over 2 hours, where we went through the full analysis of the *Louisiana* case, and, in fact, the people who were opposed to it, I think, probably had the best representation in the country with the lawyers in my Division who were advancing all the issue they had raised.

I had met on a couple of occasions with Governor Treen and State officials, because they had the burden of proof in this case to demonstrate that there was not discriminatory purpose, and I had to ascertain from my meetings with them whether they had acted with a racial purpose. So I do think that there was indeed a very thorough and extensive review, but it also appears from checking my log, Senator, that my recollection of meeting with an outside group in Louisiana is confused with some other redistricting.

I think I also ought to say that Mr. Quigley testified when he was here that he had asked for a meeting with me on several occasions and had been refused that meeting. I have checked with my staff, and I have checked my logs, and none of us have any recollection of that request from Mr. Quigley to meet personally with me, or refusal. I really must say that for everybody who has requested to meet with me since I have been in the Division, I have had an open door policy and have met with them. The only thing I can conceive of is if there was a schedule conflict when he asked that we were not able to arrange a meeting.

But I have never refused Mr. Quigley a meeting. Indeed, I have never spoken with the gentleman, to the best of my recollection. And I do not think that anybody in my Division would have refused him a meeting. They certainly have no recollection of it.

The CHAIRMAN. The distinguished Senator from Massachusetts, Senator Kennedy.

Senator KENNEDY. Thank you, Mr. Chairman

Mr. Reynolds, when you appeared before the——

The CHAIRMAN. Excuse me just a minute. I have got to open the Senate at 11. Senator Mathias, would you take the Chair in my absence?

Senator MATHIAS. Yes.

The CHAIRMAN. Thank you.

Senator KENNEDY. Mr. Reynolds, when you appeared before the committee on June 4, Senator Hatch asked you the following question:

> Mr. Reynolds, some people have claimed that you and the administration favored granting the tax-exempt status to racially discriminatory private schools, and that your position in the Bob Jones litigation case actually reflected that view. Would you comment on that particular criticism?

You responded:

> "Well, Senator Hatch, neither I nor the administration ever favored granting tax-exempt status to racially discriminatory private schools. Indeed, the President, at the time of the filing of the Bob Jones brief in the Supreme Court, offered legislation to the Congress seeking to have it made clear and explicit that those schools that engage in discrimination would not be granted tax-exempt status.

Do you stand by the answer of June 4?

Mr. REYNOLDS. I believe that is correct, Senator.

Senator KENNEDY. Now, also on June 4, I asked you the following question:

> In the *Bob Jones University* case, how could you possibly justify granting tax benefits to racist schools?

You answered in the following way:

> Well, Senator, I cannot justify that. I am opposed to that and have been opposed to that. Indeed, the administration's position throughout was that tax exemption should not be granted to schools that discriminate on account of race, and legislation was proposed to that effect.

Now do you stand by that answer?

Mr. REYNOLDS. Yes, I do, Senator.

Senator KENNEDY. Now, Mr. Chairman, I would ask that the press release issued on January 8, by the Treasury Department entitled, "Treasury establishes new tax-exempt policy," and the several newspaper articles which appeared at the time the administration made its decision to grant tax exemptions to racially segregated schools be inserted in the record.

Senator **Mathias** [presiding]. Is there objection?

[No response.]

Senator **Mathias**. Without objection, so ordered.

Senator **Kennedy**. The Treasury Department press release and the news articles reveal that the administration announced its new policy to grant tax exemption to racially segregated schools on January 8, and on the same day, the Justice Department advised the Supreme Court of the policy change and requested that the Court dismiss the *Bob Jones* case as moot. The announcement of the new policy contains no statement of the administration's opposition to tax exemption for racist schools. And a Treasury official told the press at the time the policy change was announced and the brief was filed in the Supreme Court that legislation on the tax status is not an issue that has been considered yet. And after a firestorm of criticism about the new policy, the administration responded with what was described by administration advisors as a salvage operation, which included proposed legislation to outlaw tax exemption for segregated schools.

I might just read one of the reports in the January 13 Wall Street Journal.

[Articles follow:]

[From the New York Times, Jan. 9, 1982]

U.S. DROPS RULE ON TAX PENALTY FOR COLLEGE BIAS

(By Stuart Taylor, Jr.)

Washington, Jan. 8—The Reagan administration, reversing an 11-year-old Federal policy, announced today that it would no longer deny tax-exempt status to private schools, colleges and certain other nonprofit institutions that practice racial discrimination.

The decision will apparently entitle more than 100 schools and other organizations whose tax exemptions were recorded in the last decade to receive favorable tax treatment as chartiable organizations.

Justice and Treasury Department officials said that the reason for the policy change was that policies against racial discrimination should be enforced by Congress, not the tax authorities.

REVERSAL SINCE SEPTEMBER

Allowing tax exemptions to racially discriminatory institutions is the opposite of the legal position the Justice Department took in the Supreme Court last September in a case involving a university and a school that had been denied tax exemptions for racially discriminatory admissions policies.

The department argued then that the Federal tax laws required the Government to deny tax exemptions to racially discriminatory organizations.

Today the Justice Department notified the Supreme Court that the Treasury Department had moved to reinstate its tax-exempt status of one of the two institutions in the case, Bob Jones University, in Greenville, S.C., whose exemptions was revoked in 1978, and to the tax-exempt status that had been denied to the other, Goldsboro Christian Schools, in Goldsboro, N.C. Both schools deny admission to blacks on religious grounds, although Bob Jones University has in the past admitted some blacks while maintaining a policy against interracial dating and marriages.

APPEALS NOW CALLED MOOT

The department asked the Court to grant dismiss as "moot" the appeals by those two institutions of decisions in Federal appeals court upholding the previous Treasury Department denials. The Supreme Court agreed in October to decide the appeals.

The department said it had concluded, contrary to the position in the ???? that the previous practice of denying tax exemptions to charitable and educational institutions that practiced racial discrimination or violated other "fundamental public policies," was forbidden by Federal tax laws.

The policy was announced in a press release quoting Deputy Treasury Secretary ings, was decided upon by Treasury Secretary Donald T. Regan, approved by Attorney General William French Smith, and "???? in" after the fact by the White House, according to a Treasury Department official.

The policy was announced in a press release qusting Deputy Treasury Secretary Richard McNamar, who said that the Internal Revenue Code did not explicitly authorize denial of tax deductions for racial discrimination "except in the case of racial clubs."

He explained: "We are attempting to protect the independence of all private tax-exempt organizations—many of which may follow practices and adhere to principles with which we disagree. But before the Government gets into the business of deciding which organizations are worthy of tax exemption and which are not, we want Congress to fully consider the implications of such a course."

Mr. McNamar said that the granting or denial of tax-exempt status "may mean life or death for certain organizations," making it particularly inappropriate for such a power to be exercised by the executive branch in areas where Congress has not spoken clearly.

PROVISIONS OF TAX CODE

Section 501(c)(3) of the Internal Revenue Code and revised provisions entitle qualifying chartiable, educational, religious and scientific organization to exemption from Federal income, social security and unemployment taxes. They ????? persons who make contributions to such organizations to take charitable deductions.

Since 1979, the Government has based its denial of tax-exempt status to institutions practicing racial discrimination upon legislative history and an interpretation of the word "charitable" in the ????? excluding organizations that violate "fundamental public policies."

Today, Justice Department officials said they viewed the legislaive history as meaning precisely the opposite of what it had been viewed to mean by the Nixon, Ford and Carter Administrations.

In a background briefing, another Treasury official said that the decision to grant tax exemptions to Bob Jones and Goldsboro had been "difficult" because both of them openly proclaim this refusal, for religious reasons, to admit blacks. He termed their racial practices "abhorrent to this Administration."

But he said that the policy of having the Internal Revenue Service police the racial practices of private organizations "????? divert the service from the task of raising revenues to the task of enforcing other national policies."

Had the official added that the broad direction that the Governments has assumed since 1979 to deny tax exemptions on grounds of "public policy" could, if left intact, be abused "under another Administration." He cited as example the possibility of denying tax exemptions to women's colleges on grounds of sex discrimination or to hospitals that have a policy on ?????? ??????? with the preferences of the Administration in power.

President Reagan said soon after he took office that "the taxing power of the Government must not be used to regulate the economy or bring about social changes."

[From the Washington Post, Jan. 19, 1982]

REAGAN SUBMITS BILL DENYING TAX BREAKS TO SEGREGATED SCHOOLS

(By Lee Lescaze)

President Reagan, wrestling with what perhaps has become the most embarrassing action of his first year as president, took a second step yesterday toward undoing his 10-day-old decision to grant tax exemptions to private schools that discriminate racially.

The president sent a bill to Congress that would deny all such tax subsidies and ordered the Internal Revenue Service to grant only two exemptions pending congressional action on the proposed legislation.

The result leaves the administration in the position of saying its policy is to oppose tax breaks for segregated private schools, but granting Bob Jones University of South Carolina and Goldsboro Christian Schools of North Carolina tax exemp tions at least until Congress acts. The federal government has charged the two schools with being racially discriminatory.

At the cost of a barrage of criticism that the president has taken a racist action, the administration has gone through the following policy changes with dizzying speed.

As of Jan. 7, the Reagan administration policy, as expressed in a brief to the Supreme Court, was the same as the policies of its three predecessors dating back to 1970: that it was a violation of the law to grant tax exemptions to schools that practice discrimination. No such schools could qualify and about 100 had been denied subsidies.

The next day, officials of the Justice and Treasury departments announced that it was wrong for the IRS to rule on exemptions in the absence of a bill passed by Congress. Suddenly, the policy had changed to grant all tax exemptions applied for by avowedly segregated schools until told not to by Congress. The officials, who declined to allow their names to be used in connection with their explanations of the policy switch, said the administration had no intention to submit legislation to Congress.

Reagan, prodded into action by the public outcry, took his first remedial step four days later. He declared that "I am ualterably opposed to racial discrimination in any form," and said that he would submit legislation to bar tax exemptions for schools that discriminate. The policy at that point had become to deplore granting such exemptions, but to allow them to be granted anyway until Congress acted.

With yesterday's action, the policy now is to deny all such exemptions except for the Bob Jones and Goldsboro Christian schools, which were in litigation before the Supreme Court when the administration made its first policy change Jan. 8, and to work for passage of a bill that would later retroactively strip the schools of their benefits.

The Reagan bill would apply retroactively to 1970 when the Nixon administration, under pressure from federal courts, stopped granting exemptions to segregated schools, many of which were founded in reaction to federal efforts to desegregate public schools.

If Congress were to pass a bill, but not make it retroactive, Bob Jones and Goldsboro would realize a windfall. Some lawyers, including Goldsboro's attorney, William G. McNairy, immediately raised the question whether making a tax bill retroactive is constitutional.

If the bill passes with the retroactive provision, administration officials said, anyone who has made a tax-deductible donation to either of these schools would then owe the Treasury additional tax money.

White House communications director David Gergen introduced two other officials to explain the latest move to reporters in the White House press room, but stipulated that they could not be identified by name.

He would not explain why officials are unwilling to stand publicly behind their latest action on tax exemptions.

The issue has triggered public criticism of each other by some of the president's top three advisers. Deputy chief of staff Michael K. Deaver has expressed concern that the initial move was taken Jan. 8 with only presidential counselor Edwin Meese III having had more than brief advance notice.

Meese told United Press International that the White House is making no "attempt to assess the blame" for the backing and filling over the tax exemptions.

"I think we're all concerned about the way it came out," Meese added. He said "I didn't have any recommendation at all," but that chief of staff James A. Baker III had taken the recommendation to the president "and I was along with him."

The right wing of the Republican Party strongly favors granting tax exemptions to the schools in question, many of which are religious schools.

The president described his bill as "sensitive to the legitimate special needs of private religious schools." It would permit schools to give preference or priority to members of a particular religious group, but would bar an exemption for any school if its "policy, program, preference or priority is based upon race or a belief that requires discrimination on the basis of race."

For Goldsboro, the Reagan bill would be a fatal blow, according to McNairy. Goldsboro would owe more than $1 million which it does not have and would have to close down, McNairy said.

Bod Jones would owe even more, but has greater resources and would not be forced to close, according to people familiar with its financial situation.

[From the Wall Street Journal, Jan. 13, 1982]

REAGAN BACKS AWAY FROM MOVE TO ALLOW TAX BREAK FOR SCHOOLS THAT DISCRIMINATE

STAFF REPORTER OF THE WALL STREET JOURNAL

WASHINGTON.—President Reagan has backed away from a decision to allow tax-exempt status to schools that practice racial discrimination, after a firestorm of protest.

In a White House statement, the President asserted that his decision to ask the Internal Revenue Service to grant the tax exemption has been misunderstood and said he would ask Congress to enact legislation to deny the benefit to such schools.

Mr. Reagan emphasized that he is "opposed to racial discrimination in any form." But he added that he objected to the IRS "exercising powers that the Constitution assigned to Congress. Such agencies, no matter how well intentioned, can't be allowed to govern by administrative fiat."

During his campaign, Mr. Reagan had pledged to stop what he viewed as the overstepping of authority by the IRS and other agencies. (On Friday, he agreed with a joint recommendation by the Treasury and Justice Departments to strike down the 1979 IRS ruling that denied the tax exemption to schools that practice racial discrimination.

The IRS ruling had said that the purpose of the tax exemption was to further public policy. It said that a school that discriminates on the basis of race is acting against public policy and shouldn's be considered charitable. The President contends that authority to make such a judgment rests with Congress rather than the IRS.

When the administration announced its decision four days ago, it didn't mention the possibility of asking Congress to enact the legislation that the President has since decided that he wants. Legislation on the tax status "isn't an issue that has been considered yet," a Treasury official said Friday, adding that the government expected to receive requests for tax exemptions from the more than 100 schools that have been denied tax-free status in the past decade.

AIDES OBJECT

The administration's reversal clearly reflects a miscalculation of the politics of the issue and the protest that evolved. Before Friday, a black presidential aide said, "the political impact was discussed but hurried over." Once the effect of the decision sank in at the White House, he said, the administration went into "a panic."

Yesterday, two black presidential aides, who were upset with last week's decision, met privately with the President to convey the black community's sense of outrage. They were followed by Samuel Pierce. Secretary of Housing and Urban Development, the only black Cabinet member. Sources say Mr. Pierce was deeply troubled by the announcement.

The President also met with Republican congressional leaders including Sen. Robert Dole, chairman of the Finance Committee and Sen. Strom Thurmond, chairman of the Judiciary Committee. A White House spokesman said that there was "general agreement" after the session that the administration should seek legislation that "would prohibit tax exemptions for organizations that discriminate on the basis of race." The spokesman said the legislation will be submitted to Congress "promptly."

FURTHER PROBLEMS

But that hardly will diffuse the issue, and some White House officials fear that no matter what the President does he will further alienate both blacks and the conservative religious groups who support many of the schools at the center of the controversy. "The blacks are upset with us and the 'new right' now will be, too," one White House adviser said.

Also, the White House stands to take a drubbing from congressional Democrats eager to seize an opportunity to embarrass the administration and to win back those blacks who supported the President. Rep. Dan Rostenkowski, chairman of the House Ways and Means Committee, announced that he would hold hearings on the issue Feb. 4.

The Supreme Court agreed last fall to hear appeals by Bob Jones University of Greensville, S.C., which restricts black enrollment, and Goldsboro Christian Schools in Goldsboro, N.C., which bars blacks from its elementary and secondary classes. Both schools had sued the IRS to obtain tax exemptions as private religious schools. They lost in a federal appeals court in Richmond, Va.

The Justice Department defended the IRS ruling in a Supreme Court filing last summer. In the fall, it supported the appeal to the high court because it wanted a definitive ruling to dispel any doubt as to the authority in the matter.

On Friday, the administration abruptly reversed that posture and asked the Supreme Court to dismiss the appeal. A decision by the Supreme Court isn't expected until Monday, at the earliest. The move was hailed by the conservative schools and their religious backers but roundly criticized by civil rights groups.

Yesterday, the IRS complied a collection of editorials denouncing the decision from newspapers in Seattle, Los Angeles, New York and Washington D.C., among other cities.

[From the New York Times, Jan. 19, 1982]

REAGAN ACTS TO BAR TAX BREAK TO SCHOOLS IN RACIAL BIAS CASES

(By Steven R. Weisman)

WASHINGTON, Jan. 18—President Reagan, in another modification of his position of Federal tax exemptions for racially discriminatory private schools, said today that the Internal Revenue Service would withhold exemptions from such schools until Congress acted on the issue.

At the same time, the Administration proceeded with the reinstatement of tax-exempt status for the time being of two schools that practice discrimination, Bob Jones University in Greenville, S.C., and Goldsboro Christian Schools in Goldsboro, N.C.

Administration officials said the schools' tax-exempt status would be revoked if Congress approved a bill that Mr. Reagan submitted today with the request that it be given "the very highest priority."

In a letter addressed to the Speaker of the House and the president of the Senate, Mr. Reagan again expressed his "unalterable oppositon to racial discrimination in any form." Such practices, Mr. Reagan said in the letter, "are repugnant to all that our nation and its citizens hold dear, and I believe this repugnance shoud be plainly reflected in our laws."

Mr. Reagan said his proposed legislation was "sensitive to the legitimate special needs to private religious schools" that used religion as a criterion for admission.

The legislation would be retroactive. If the two schools are affected by it, they would be required to return to the Government any benefits they received under tax-exempt status.

The prospects for Mr. Reagan's legislaton in Congress remain uncertain. The President has won the backing of his allies in the leadership of the Republican-controlled Senate. The Democratic leaders of the House, maintain that there is no need for the legislation, and that the Administration acted unlawfully in restoring tax-exemptions for segregated schools.

REACTION TO JAN. 8 ANNOUNCEMENT

The President's action today was the latest in a series of steps he has taken after his advisers warned him last week that he was being viewed as racist. The warnings were prompted by reaction to a Jan. 8 announcement by the Treasury and Justice Departments, with Mr. Reagan's personal approval, that the the revenue service would no longer deny tax exemptions to segregated schools.

Specifically, the Justice Department informed the Supreme Court that the Administration was dropping its opposition to lawsuits brought by both Bob Jones and Goldsboro schools, seeking restoration of their tax-exempt status.

In announcing that action, Administration spokesman said Mr. Reagan was simply opposed to the Internal Revenue Service or any Government agency taking such action administratively. The spokesman said the denial of tax exemptions was a matter for Congress, adding that there were no plans for the Administration to request any legislation on the matter.

Over the next few days, however, a torrent of criticism engulfed the Administration. Democrats, moderate Republicans, civil rights activists and others accused Mr. Reagan and his aides of insensitivity, and civil rights organizations asked the courts to continue to bar the tax exemptions on the ground that they were prohibited under present law.

SALVAGE OPERATION ATTEMPTED

In response, and in what advisers now say, was a "salvage operation," the White House announced last Tuesday that Mr. Reagan would propose legislation to outlaw tax exemptions for segregated schools.

Institutions exempt from Federal taxes are not obligated to pay Social Security or unemployment compensation taxes, and donors to such schools may deduct their payments on income tax forms as charitable contributions.

In effect, Mr. Reagan's proposed legislation seeks to end a practice his aides had initiated with his approval, with today's action a reinforcement of what was being seen as a contradiction. The Administration is saying that it will not grant tax exemptions to segregated schools, even if the Supreme Court rules it can do so legally, until Congress disposes of the matter.

In a briefing for reporters late this afternoon, Administration officials maintained that an unusual situation had arisen in the Bob Jones and Goldsboro school cases. The aides said that the Administration effectively has no choice but to award tax-exempt status of these two institutions, because its original action in the Supreme Court has constituted a binding "pledge" to proceed with the tax exemptions.

But the Reagan officials made clear their view that, if the legislation submitted today is approved, the tax-exempt status of Bob Jones and Goldsboro will be revoked.

David R. Gergen, the White House communications director, denied that political ties to the White House by Senator Strom Thurmond, Republican of South Carolina, had any influence on the decision today to proceed with tax exemptions for Bob Jones University, which is in the Senator's home state.

Both Bob Jones University and Goldsboro Christian Schools are religious-oriented institutions. Bob Jones University prohibits interracial dating, and the Goldsboro Christian schools are accused of discriminatory admissions policies.

Administration officials, who talked with reporters on the ground that they not be identified, said there were no applications pending from segregated schools seeking to have their tax-exempt status restored. The officals said that 100 such requests were denied in the last four or five years.

The officials said the process of awarding tax-exempt status to Bob Jones University and Goldsboro Christian Schools would be completed in a few weeks.

[From the New York Times, Jan. 13, 1982]

President Shifts View on Tax Rule in Race Bias Cases

(By Howell Raines)

WASHINGTON, January 13.—President Reagan, in an abrupt policy change prompted by advisers' warnings that he was being viewed as racist, called today for legislation to outlaw tax exemptions for organizations that discriminate racially.

However, the President's announcement leaves in piece a new policy of granting tax exemptions to segregated private schools until Congress outlaws it. The result is a contradictary state of affairs in which the President is proposing legislation to end a practice indicated last week with his blessing.

Four days ago, Treasury and Justice Department officials, with Mr. Reagan's direct personal approval, announced that the Internal Revenue Service would no longer deny tax exemptions to nonprofit institutions, particularly, private schools, that practice racial discrimination, as the service had done since the Nixon Administration.

THREE AIDES WARN HIM

A White House spokesman said that this rapid turn around came after three black officials of the Reagan Administration warned the President today about the "depth of the misunderstandings and the misimpressions" that Friday's action erected among blacks about his racial attitudes.

The spokesman, David R. Gergan, read a statement today in which Mr. Reagan said he is "unalterably opposed to racial discrimination in any form." But, in the statement, Mr. Reagan defended his decision to end Internal Revenue Service's 11-year policy of denying exemptions to discriminating institutions. "Such agencies," he said, meaning the Internal Revenue Service, "no matter how well intentioned, cannot be allowed to govern by administrative fiat."

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"I believe the right thing to do on this issue is to enact legislation which will prohibit tax exemptions for organizations that discriminate on the basis of race," Mr. Reagan's statement said.

When enacted, such legislation would reverse the new policy announced last Friday by Treasury and Justice officials. Mr. Gergen said today the President approved that announcement because it had the "unanimous support" of officials in those two departments, as well as the support of top White House advisers.

Asked why the President's advisers did not foresee the political uproar, Mr Gregen, the White House director of communications, offered no explanation. Prodded repeatedly to concede that Mr. Reagan was acting in an effort to escape a political disaster, Mr. Gergen said at one point. "I'm not trying to ascribe one motivation or another to it."

The Administration's move last week evoked considerable hostile comment. Senator Daniel Patrick Moynihan, Democrat of New York, said that the move was "surely immoral and, in my view, illegal as well." He said. "This was a decision to give in to the forces in Congress that want to undo the civil rights movement."

Representative Charles B. Rangel, Democrat of New York, said. "This is clear evidence not only that this Administration will permit racial discrimination to occur, but indeed that it is itself subsidizing racist activity."

The Council for American Private Education, which describes itself as representing organizations that enroll nearly 86 percent of private school students, said, "We find this a highly regressive stop with serious implications for the future of private schools and of American education."

Mr. Gergen acknowledged that there had been a rapid series of meetings among White House aides about this political fallout. Two senior advisers Michael K. Deaver and Edwin Meese 3d, arranged for Mr. Reagan to talk to two black White House aides and the only black Cabinet member, Samuel R. Pierce Jr., the Secretary of Housing and Urban Development.

But not until sometime today, Mr. Gergen indicated, did the President decide to call for the legislation that the White House spokesman said embodied the President's true feelings on the racial and legal issues involved.

The announcement marked the second time in a year that the White House announced a major initiative then quickly abandoned it in the face of spreading protest. Last spring, Mr. Reagan approved a plan to reduce Social Security benefits, early to set it aside and ask Congress to come up with a plan as a substitute.

HE MET WITH SUPPORTERS

Before announcing today's decision, Mr. Reagan met with four Republican Congressional leaders, including two South Carolina conservatives, Senator Strom Thurmond and Representative Carroll A. Campbell Jr., who had urged him to approve tax exemptions for schools with racially restrictive policies.

Such conservatives and leaders of the religious right were cheered by last week's episode in this political drama. That came when the Justice Department informed the Supreme Court that the Treasury Department wanted to reinstate the tax exempt status of Bob Jones University in Greenville, S.C., and grant such status to Goldsboro Christian Schools in Goldsboro, N.C. The Justice Department asked the Supreme Court for permission to vacate suit involving the institutions.

Bob Jones University, which lost its tax exempt status in 1979, prohibits interracial dating. Goldsboro Christian Schools are accused of having discriminatory admissions policies. A treasury official who asked not to be named said that today's White House announcement would have no immediate effect on the status of the schools. The revenue service has deferred consideration of their tax exemptions pending the Supreme Court ruling on the Justice Department's request to vacate the suit, this official said.

IRS LISTS INELIGIBLE SCHOOLS

On Monday, the Internal Revenue Service made public the names of 111 private schools that had been listed as ineligible for tax deductible constributions or were involved in litigation about revocation of their tax-exempt status because of their policy of racial discrimination.

Schools like Goldsboro Christian that were never granted tax-exempt status because of discriminatory policies were not included.

The schools listed were these:

Alabama; Crenshaw Christian Academy, Lutheran; Bullock County Private School Foundation, Union Springs; John T. Morgan Acad., Selma; Union Acad. Private School Fndtn., Dadeville; West Brimingham Christian School; Greystone Christian

Grade School of Mobile; Wilson School Fndta., Catherine; Butler County Private School Fndta., Greenville; Salt Springs Acad., Jackson; the Southern Acad., Greenboro; Lownee Acad., Hayneville; Southeast Education. Dothan; Dixie Acad., Clayton; Hoover Acad., Brighton; Wilcox Educ. Fndta., Camden; Macon County Private School Fndta., Tuskegee; Jefferson Acad., Birmingham.

Arkansas'; Desota School, Helene.

Florida; Private Educators, St. Augustine; Dade Christian School, Miami; Trinity Christian Acad., Jacksonville; Indian River Acad., Fort Pierce; Jupiter Christian School; Temple Heights Christian Schools, Tampa; Howery Acad., Heway-in-the-Hills; Panama City Christian Private School; Providence Christian School, Riverview.

Georgia; Macon Christian Acad.; Bainbridge Christian School; Stone Mountain Christian School; Nathaniel Green Acad., Siloam; the Heritage School, Newman.

Louisiana; Silkman Institute, Clinton.

Maryland; Bay County School, Arnold.

Mississippi; Adams County Private School System, Natchez; Benton County Educ. Fndta., Ashland; Calhoun Educ. Fndta., Canton Acad.; Central Holmes Acad., Lexington; Citizens' Educ. Fndta., Vicksburg; Columbia Educ. Fndta., Columbus; Clay County Educ., Fndta., West Point; Council School Fndta., Jackson; East Holmes Acad., West Durant; Forest County School Assn., Mattiesburg; Greenwood-LaFlore Educ. Fndta., Greenwood; Grenada Educ. Fndta., Morrison County private School Fndta. Biloxi; Humphreys Acad. Fndta., Bisoni; Jackson Acad., Jackson; Lamar School Fndta., Meridian; North Sunflower County Educ. Fndta., Ruleville Noxubee Educ. Fndta., Macon; Sharkey-Issaquena Acad. Fndta., Rolling Fork; Southwest Acad., Jackson; Southwest Missisippi Christian Acad., Summit; Coving School Fndta., Mount Olive; Crui Tchula Acad. Fnttn., Crugsr; ????? Educational and Development ????? East Meridian; Paspoint Private School Messpoint; Pines Private School ???? Wiggins; Rebul Acad., Learned; School Educ., Fndtn., Shaw; the Turnace lagin of Learming. Tunica; Oktibbing Edc. Fndtn., Starkville; Claiborne Edc. Fndtn., Marshall County Edc. Fndtn., Q??man County Educ., Fndtn; Indian Educ. Fndtn., Derr Creek Educ. ???? Luis Rich Educ. Fndtn.

North Carolina; Twelve Oaks Acad., ???? North Street Day Nursery and Kind??? Raliegh; Palmer Ale?????? ????? Dadeville; Wilson Christian School Wilson Pamelico Community School Washington.

South Carolina; Bob Jones University, Greenville; Southern Methodist Schools, Orangeburg; Francis Marion Acad., ????? Thomas Sumter Acad., Daiseli; ???Hampton Acad., Orangsburg.

[From the Treasury News, Jan. 8, 1982]

TREASURY ESTABLISHES NEW TAX-EXEMPT POLICY

The Treasury Department announced today that without further guidance from Congress, the Internal Revenue Service will no longer revoke or deny tax-exempt status for religious, charitable, educational or scientific organizations on the grounds that they don't conform with certain fundamental public policies.

"In the past,"said Deputy Treasury Secretary R. T. McNamar, "the IRS has revoked the tax exemptions of organizations which, did not adhere to certain fundamental national policies, such as those forbidding discrimination on the basis of race, even though this requirement is not explicitly stated in the Internal Revenue Code except in the case of social clubs."

"Whether or not the Treasury Department or this Administration agrees with the position of the IRS in particular cases is not the issue," McNamar stated. "The question is whether the IRS is required under the Code as enacted by Congress to decide—as a condition to granting or continuing tax-exempt status—whether private organizations conform with fundamental national policies. The Treasury Department has concluded that this kind of judgment—which may mean life or death for certain organizations—is fundamentally a question for Congress; and if the authority to make this judgment is given by Congress to an administrative agency it should be done in explicit terms and subject to specific guidelines."

As a consequence of this decision, the IRS will restore the tax exemption of certain organizations which had previously been revoked. In particular, the appeal of Bob Jones University, and the Goldsboro Schools, which are currently before the Supreme Court will be rendered moot.

"In taking this action," McNamar stated, "we are attempting to protect the independence of all private tax-exempt organizations—many of which may follow practices and adhere to principles with which we disagree. But before the government gets into the business of deciding which organizations are worthy of tax exemption and which are not, we want Congress to fully consider the implications of such a course."

The Treasury Department decision reflects the advice of the Department of Justice that the authority which the IRS previously had been asserting as its basis for revoking the tax exemptions in question is not supported by the language of the Internal Revenue Code or its legislative history. The Internal Revenue Code provides tax exemptions for "Corporations (or other organizations) organized and operated exclusively for religious, charitable, scientific . . . or educational . . . purposes . . . " IRC Section 501(c)(3), 26 U.S.C. Section 501(c)(3). The Justice Department has advised that both the language of Section 501(c)(3) and the statute's legislative history provide no support for the statutory interpretation adopted by the Commissioner in 1970. Thus the IRS is without legislative authority to deny tax-exempt status to otherwise eligible organizations on the ground that their policies or practices do not conform to notions of national public policy.

This new policy is reflected in a motion filed with the Supreme Court today by the Justice Department to vacate a case in which the Internal Revenue Service revoked the tax-exempt status of Bob Jones University and Goldsboro Christian Schools. IRS revoked the Bob Jones University tax exemption in 1970 on the grounds that the school's racial policies violated Federal policies on racial discrimination. This decision was nullified by the U.S. District Court in South Carolina on June 30, 1971. However, the lower court's decision was reversed by the 4th Circuit Court of Appeals on December 30, 1980.

Similarly in 1974 the IRS determined that Goldsboro Christian Schools Inc. did not qualify for an exemption on the grounds that it maintained a racially discriminatory admissions policy. On May 17, 1980 the District Court for the Eastern district of North Carolina upheld the IRS decision. On February 24, 1981 the Court of Appeals for the 4th Circuit affirmed this judgement period.

Both schools appealed the Circuit Court decision to the Supreme Court which accepted the Circuit Court decision to the Supreme Court which accepted their petitions for certiorari on October 13, 1981.

Senator **Kennedy** [reading].

When the administration announced its decision four days ago, it did not mention the possibility of asking Congress to enact legislation that the President has since decided that he wants. Legislation on the tax status is not an issue that has been considered yet, a Treasury official said Friday, adding that the Government expected to receive requests for tax exemptions from more than 100 schools that had been denied tax-free status in the past decade. The administration's reversal clearly reflects a miscalculation of the politics of the issue, and the protests that evolved. Before Friday, a black Presidential aide said that the political impact was discussed, but hurried over. Once the effect of the decision sank in at the White House, he said, the Administration went into a panic.

The President also met with Republican Congressional leaders, including Robert Dole, Senator Thurmond. A White House spokesman said there was general agreement after the session that the Administration should seek legislation that would prohibit tax exemption for organizations that discriminate on the basis of race. The spokesman said that the legislation will be submitted to Congress promptly.

Now, which is it? Is this a reasonable reflection of what happened, to your understanding, or is it the way you stated it before, that right from the very outset, they had made the judgment that they were going to introduce legislation to deal with the reversal of what had been the IRS policy since 1970?

Mr. **Reynolds**. Well, Senator, I believe as I stated before that the matter of legislation had been considered and was under consideration. I was not involved in the legislative aspect of it. My whole frame of reference was in terms of the litigation from the Supreme Court's standpoint, and I really was not in that activity at all.

But I do know that Deputy Secretary McNamar of the Treasury Department, who testified before the Senate Finance Committee, was asked the question, and if I can give you his answer, I believe that he was the one that was in charge of and responsible. The question he was asked was if our No. 1 goal is to prohibit racial discrimination rather than the goal of tax-exempt status to certain institutions that have not previously been granted it, it looks like we took care of that first, and then as an afterthought, at least in time sequentially, we came in and supported statutory change.

Now, why the time sequence? Why didn't we come up with statutory recommendations first and say, "Let's clear this up now. We have some doubts. Let's nail this down in statute, and then do the other." That was a question by Senator Boren.

Secretary McNamar's answer was:

> Senator, you are absolutely right. Had we to do it over again, we would have made the joint announcement at the time. And I take full personal responsibility for that, and I think that ought to be noted. I had initially proposed that we consider that legislation and announce it simultaneously. The legislation, as we began to look at it, the First Amendment question, the intent versus effects question, the civil rights statutes, and a variety of other things involving the legislation made it extremely complex to develop at the time.
>
> As I mentioned in my testimony, I was out of town at the time the decision was announced on the 8th. Had I been in town, I would have done the press background briefing, and I would have said in answer to questions of legislation that we had it under consideration.
>
> Now, let me be very candid in admitting that it was my mistake not to push hard enough, because I was working on Polish debts and some other things at the time. But you were quite right, and that is what we should have done.

Now, as I say, I was not involved in that, Senator. I was on the brief and on the legal side of it with the Supreme Court. My understanding was indeed that it had been considered, but it was certainly something that was not pushed, and I think the administration made a mistake in that regard. It was very much accelerated after the brief and the response to that, and I think it was 4 days after that that the President announced he was sending legislation up to the Hill.

Senator **Kennedy**. As I understand it, the official position of the administration was included in the Treasury press release of January 8. That was the definitive statement of the administration.

If there is another release, I would welcome it, but it is my understanding this was the statement of policy by the administration, and that was issued on January 8.

I find in reviewing that particular statement of policy virtually no expression—none—by the administration whatsoever about the issue of tax-exempt status for schools that were involved in segregated policies; absolutely no reference to it whatsoever, let alone any statement that the administration intended to request legislation to deal with this issue.

We have the proliferation of different news articles which show quite the contrary. Those articles, plus the Treasury press release have to be balanced against what your testimony is on this particular question, which I understand to be that right from the beginning, the administration, the President and yourself opposed this change in policy on the basis of the merits and not for other kinds of reasons.

I want to move, if I could, to the Mississippi voting rights issue which I raised with you the last time. I know a good deal has been talked about in terms of time. We had requested documents some 3 weeks ago, and these documents were provided last night at 5:45 p.m. to my office, and I understand that other documents relating to the *North Haven* case, the *Hishon* case, are going to be made available to the committee this morning. I address again the question of your views on the Mississippi voting rights case.

Now, the last time you were here, I inquired about your position on the 11 voting rights lawsuits opposed by your staff following your visit to Mississippi with the Reverend Jackson in 1983 and in your appearance before the committee on June 4, we discussed the fact that your staff had recommended that you file suit in those cases, and you declined to do so, and I expressed concern that you were overruling your staff on these cases. You explained your staff actually agreed with your decision not to file because there were private actions pending, and it was at the 11th hour, and you told me in response to repeated questioning that there was nothing in writing which refers to the disposition of the staff's recommendation to file the Mississippi voting rights lawsuits.

In particular, I asked you the following question during your confirmation hearing:

> Do I understand there were a series of staff recommendations for the intervention of the Justice Department in the various voting rights cases in Mississippi, and you had meetings with the staff, and as a result of those meetings, as I understand, the staff had turned around, and the decisions were made for non-intervention. I am just wondering whether at any time, you wrote anything down on your own position, the reasons for it, the reasons why you believed the staff turned around and reversed their position?

And you responded in part as follows:

> I think that the only writing that addresses that is contained in certain responses that I had made to the accusation on prior occasions by some that the reason we did not go into those ten cases was for the purpose of disagreeing with the position that the staff wanted to assert. And in response to that accusation, I gave the same answer I have given you today, and that is, written in certain places where we have issued responses to the accusations.

Later, I asked you this:

> Is there any other written on these matters, whether it is on the Selma case or Bob Jones, or with regard to the Mississippi cases, any other written information that would be of value or use, or notes of telephone calls that are available now?

And you replied:

> Senator, I believe the Committee made a request for those documents. We have been very forthcoming in turning them over. I am not aware of other documentation in the files that would bear on those matters.

Now, do you stand by the testimony as I just read it to you?

Mr. REYNOLDS. Yes, Senator.

Senator KENNEDY. We received a memorandum last evening at 5:45 in response to a Supplemental Document Request. This memo is dated July 26 from you to the Chief of the Voting Section, concerning the recommended lawsuit against Lincoln County Board of Supervisors in Mississippi. In this memo, you state that you cannot approve the proposed complaint, because Count No. 2 of the complaint does not state an adequate claim.

This memo troubles me for several reasons. First, it is certainly a document which bears on your decision not to file the suit in Lincoln County, MI, recommended by your staff; yet, it was not produced in response to our first document request, and in your testimony on June the 4, you certainly raised doubts whether it existed.

Second, it does not discuss any of the reasons for not filing the Lincoln County suit which you said were the only reasons you did not file the Mississippi lawsuits.

I do not know whether you have had a chance to review the document, which is to Mr. Jones, the Chief of the Voting Section, from Brad Reynolds, July 1983. Are you familiar with that?

Mr. REYNOLDS. Yes, I am.

Senator KENNEDY. All right. This memo does not state that your staff agrees that the complaint they drafted should be filed, does it?

Mr. REYNOLDS. I am sorry?

Senator KENNEDY. It does not state that your staff agrees that the complaint they drafted should not be filed.

Mr. REYNOLDS. It does not state that.

Senator KENNEDY. And it does not state that private counsel for black voters says your staff recommended the complaint should not be filed.

Mr. REYNOLDS. No, it does not say that.

Senator KENNEDY. And it does not state that filing—if I could just continue for another minute on this subject, Mr. Chairman——

Senator MATHIAS. Is there objection?

[No response.]

Senator MATHIAS. One more minute.

Senator KENNEDY [continuing]. Thank you—and the memo does not state that filing your staff's recommended complaint would be counterproductive, does it?

Mr. REYNOLDS. No, I do not believe it does say that, Senator.

Senator KENNEDY. And are there any other memos which you wrote which refer to your staff's recommendation in the 11 proposed Mississippi voting rights cases?

Mr. REYNOLDS. No, Senator. This was on the 26 of July, I believe, and it was at that time that all of the cases that we were going to get in, we would have to get in at that time, or there would be decisions rendered by the courts. As I explained earlier, there was that timeframe, and so this was the only one I wrote.

I would say, Senator, that this document was turned over at the earlier document request. It was made available. It was not copied by your staff, but it was down in the materials that we made available to you, and they came down and reviewed those materials. So I do not know why it is that you did not get a copy, except that they overlooked it in their review, and therefore you did not receive a copy among what they copied.

Senator KENNEDY. Well, I will certainly check with staff. But I asked you whether it existed, if you knew that it existed. Why didn't you respond to me when I asked you whether it did exist?

Mr. REYNOLDS. What I did respond is that we had turned over all the materials. You were asking were there any other——

Senator KENNEDY. I asked you if you made any notes with regard to these cases.

Senator MATHIAS. The Senator's time has expired.

Mr. REYNOLDS. I am sorry, Senator. I thought you had asked whether there were any other materials that I knew of that had not been turned over that would be relevant to this inquiry, and my answer was that I was under the impression we had turned over all the information, and it had been down there for your staff to review. My understanding is that when you asked, I guess it was Friday, for additional documents including this, we went into that room, and this document that you refer to was among that pile that had indeed been made available, and we copied that and made it available to you.

Senator MATHIAS. In light of the fact that the timing of this request has been raised, I think in fairness to the Justice Department we should note that the request from Senator Biden was dated June 14, which was Friday, and the Justice Department supplied the materials on June 17, which was Monday.

Mr. Reynolds, as I stated earlier, my concept of this hearing today is to clarify some points of the record that were left somewhat ambiguous at the end of the last hearing.

I would like to turn now to the Voting Rights Act, because there were several questions that you discussed with members of the committee in which there was a change in voting practices—it usually involved redistricting—which was submitted to the Justice Department as required under section 5 of the Voting Rights Act. These were cases in which the Department did not interpose any objection to that change, but in which a Federal court, in a later lawsuit brought by private parties, struck down the change.

Now, 2 weeks ago when we discussed this, you suggested that there were only two such cases. At least my recollection is that you have mentioned two cases.

I would like to raise with you three other cases that I think need to be discussed in this context. One that is very clearly in the pattern is *Major* v. *Treen*, which you have already mentioned this morning. It is the congressional redistricting case from Louisiana. Another example is the legislative reapportionment case which arose in North Carolina, the *Gingles* v. *Edmisten* case, which is now pending before the Supreme Court. The third is a case in which a three-judge court struck down a voting change that the Justice Department had approved. That is the case of *Buskey* v. *Oliver*, which involved city council districts in Montgomery, AL.

Is that correct?

Mr. REYNOLDS. I believe that is correct.

Senator MATHIAS. A fourth case which was cited to the Committee is the Texas case of *Nisby* v. *Commissionsers Court of Jefferson County*, which involved a county redistricting plan. The testimony revealed that this redistricting had been approved by the Justice Department under section 5, but was struck down as racially discriminatory in a subsequent private lawsuit under section 2 of the Voting Rights Act.

Is that a very brief but accurate summary of that situation?

Mr. REYNOLDS. I believe that is correct.

Senator MATHIAS. A fifth case, with a similar pattern but with some difference, is the Greene County, AL, Racing Commission case, *Hardy* v. *Wallace*. In that case the Justice Department did not object because it thought the change was not subject to section 5.

The three-judge court disagreed with that conclusion and ordered the State to submit the change for preclearance. In other words, in that case, the disagreement was a jurisdictional one, rather than a disagreement on the merits or the substance. Is that an accurate summary?

Mr. **Reynolds**. That is my understanding, Senator.

Senator **Mathias**. Besides these five cases, are you aware of any other instance in which there has been a section 5 determination made by the Justice Department which has been overturned in a subsequent private lawsuit under section 2?

Mr. **Reynolds**. Those five were brought to my attention, Senator, as the ones where that had occurred. I am not aware of any others, but I cannot say there are no others; I am just not aware of any others.

Senator **Mathias**. But those are all that you are personally cognizant of?

Mr. **Reynolds**. That is correct, Senator.

Senator **Mathias**. In the first hearing, you pointed out that some of these cases involved preclearances that were made before the 1982 amendment to section 2 of the Voting Rights Act and private lawsuits that were determined after that amendment went into effect.

Do you recall that?

Mr. **Reynolds**. That is correct, Senator. I believe that is the case with respect to three of the five.

Senator **Mathias**. But isn't it a fact that the 1982 amendment did not change section 5, which was the section under which you acted?

Mr. **Reynolds**. That is correct. It did not amend section 5.

Senator **Mathias**. What were you trying to tell the committee about the impact of the intervening passage of the 1982 amendment on these cases, if section 5, the section under which you acted, had not been changed?

Mr. **Reynolds**. Senator, when I made my determination under section 5, there was not available to me the new section 2 standard which related to discriminatory results that Congress enacted in the 1982 amendments. After my preclearance in three of those cases, the courts determined that the particular redistricting or voting change had a discriminatory result under the new amended standard that was not available to me. So, with regard to those three cases—and I think they are *Major* v. *Treen,* the *Gingles* case, which is a North Carolina case, and the *Buskey* case—the court was applying a different standard than one that was available to me, a standard that came into existence by virtue of the 1982 amendment. What I had based my decision on was the section 5 standard that differed from that.

Senator **Mathias**. So you are saying that the impact was limited to cases concerned with discriminatory effect, as opposed to cases based on discriminatory purpose?

Mr. **Reynolds**. Well, I think that one of the cases that you mentioned, *Buskey* v. *Oliver,* the court did indeed, under the new section 2, say that there was discriminatory purpose, and that was one of the two that I had reference to that had disagreed with my determination under section 5, which also has the purpose standard.

But the other cases went off on discriminatory effect under the new section 2, which was not a standard available to me.

Senator **Mathias**. If the court decided that the *Buskey* case went off on the question of a purposeful discrimination from the very beginning, wasn't that a violation of section 2? Would the 1982 amendment have had no impact on that case?

Mr. **Reynolds**. Well, I think in essence, that is correct, Senator, and that is the point I was trying to make. With respect to the *Buskey* case and also I believe the *Hardy* case, *Hardy* v. *Wallace*, involving Green County, those are the two cases that I am aware of that I testified to when I was here before, where a court had reached a contrary conclusion than the conclusion I had reached, based on a similar standard that was available to both of us.

In the other three cases, the court reached a contrary conclusion, but based on a new standard that had been enacted in the statute subsequent to the time of my preclearance decision.

Senator **Mathias**. The Greene County case was a decision which involved the Department's jurisdiction under section 5.

Mr. **Reynolds**. That was certainly my understanding of it, that is correct.

Senator **Mathias**. So that the 1982 amendments had absolutely no bearing on that case?

Mr. **Reynolds**. That is right, that is correct.

Senator **Mathias**. Therefore, the 1982 amendments had a limited impact on these five cases.

Mr. **Reynolds**. Well, the 1982 amendments on two of the cases had no impact, and the court reached a contrary conclusion based on a standard similar to the one I used. In the other three, I think the 1982 amendments had a significant impact, because the courts relied on the new standard to reach a contrary result. But in the process of doing so, the courts made it clear they were not overruling the section 5 determination of the Attorney General that had been made on a different standard.

Senator **Mathias**. Can you tell us the status of the *Treen* case? As I understand it, that was not appealed.

Mr. **Reynolds**. I think the *Treen* case was not appealed, and it therefore was not in litigation, and it is final, as I understand it.

The *Gingles* case is a case that has gone to the Supreme Court; the Court has granted certiorari, and the case is to be heard next term by the Court.

The *Hardy* v. *Wallace* case, I believe—I do not know whether the time has yet run for an appeal to be taken or not, Senator—is a recent case, and at this juncture, my understanding is it has not yet been appealed, and it may be that the time has run; I just do not know that.

What is the other one? The *Buskey* v. *Oliver* case, I believe, is no longer in litigation.

Senator **Mathias**. I believe that also is final.

Mr. **Reynolds**. I believe it is.

Senator **Mathias**. What you call the *Gingles* case, and what I call the *Edmisten* case—to perpetuate the memory of our former staff member here—is before the Supreme Court. The Government has filed a brief in that case, has it not?

Mr. **Reynolds**. Yes; it has, Senator.

Senator **Mathias**. In that brief, the Department has asked the Supreme Court to summarily affirm the decision as to those jurisdictions that were precleared; am I right about that?

Mr. **Reynolds**. I believe that was the request that we made—and the reason I hesitated was only that when we filed at the jurisdictional stage—actually, I stand corrected. Excuse me, Senator. At the jurisdictional stage, we filed a brief asking that the Court summarily affirm. The Court instead set the matter down for argument, and it has to be fully briefed on the merits, and I do not believe that we have—I really think we have not filed our brief on the merits. But at the time that the jurisdictional statement was filed, I believe it is correct that we did ask the Court to summarily affirm.

Senator **Mathias**. I have here the amicus brief which states,

> The appellant's challenge to the district court's invalidation of House District eight and Senate District two is based solely on the ground that since these districts had been precleared by the Attorney General pursuant to section 5, they are therefore not subject to challenge in court under section 2.

Skipping some lines, it then reads,

> As to these districts, the Court should summarily affirm the judgment of the district court.

Mr. **Reynolds**. That is right.

Senator **Mathias**. That is quoting from the brief.

Mr. **Reynolds**. OK. That is correct.

Senator **Mathias**. What we have here, then, are five cases. In four out of the five cases, the courts have reversed the section 5 determination made by your office, and the judgments are final. In the fifth, the United States, acting through the Justice Department, has asked the Supreme Court to make it final. Five out of five; is that correct?

Let me review that again. We have five cases in which the courts have overturned the section 5 determinations of the Civil Rights Division. In four out of the five cases, that judgment has become final. In the fifth of the five cases, the United States has asked the Supreme Court to make it final.

Mr. **Reynolds**. On those terms—the only difference I would have with that statement, I believe, Senator, is that I think that in three of those five, the court reached a different conclusion than the Justice Department, but did not overturn the Attorney General's decision because the court reached that conclusion on a different standard.

When I was here last time, I had a discussion with Senator Biden as to whether, if section 2 had been available to me at the time that I reviewed the Louisiana case for preclearance, whether I would have reached the decision that the court reached under the new section 2 standard. I said that it is likely that if I had had that standard available to me, I would have reached that, but I did not have it available to me.

So the only point that I think ought to be made is that in three of those cases, the courts reached a different conclusion on a different standard than that which had been reached by the Department of Justice. If I had had that standard available to me, I do not know how I would have decided the other two cases.

Senator **Mathias**. Thank you, Mr. Chairman.

The Chairman. The distinguished Senator from Ohio, Mr. Metzenbaum.

Senator Metzenbaum. Thank you, Mr. Chairman.

Mr. Reynolds, I want to go back to some of the issues, because I am not sure that point has been sufficiently clarified.

You testified at the last hearing, as stated by Senator Thurmond:

> I talked to the private attorneys that were involved in those suits, as well as having further conversations with my staff, and it was the agreement of all of us that it made no sense for the Justice Department to come into those lawsuits, that there were already private actions pending, that we all felt that the courts were going to do what was asked in those cases, and that the involvement of the Federal Government at the 11th hour would probably be more disruptive than productive. And for that reason, it was agreed by everybody, including the staff that originally recommended that I go in, and the private attorneys"—plural—"that we not go into those lawsuits.

Now, I have trouble accepting your statement, Mr. Reynolds. First, Mr. Frank Parker, who represented the plaintiffs in many of those Mississippi cases, testified at the last hearing: "I represented the parties in seven of those lawsuits. I never heard from Mr. Reynolds."

We also now have affidavits from other plaintiff lawyers in those cases, and they all say they never heard from you.

Let me read from a couple of them. Ms. Patricia Hanrahan states: "I was never contacted by Mr. William Bradford Reynolds regarding whether the U. S. Department of Justice should file a redistricting lawsuit."

Mr. Nauseed Stewart states:

> I was never contacted by Mr. William Bradford Reynolds. During this period, I never told Mr. Reynolds or any member of his staff that the Justice Department should not file any lawsuits to challenge the existing county redistricting plan in this county or to intervene in this case.

The other affidavits are similar. In fact, in one case, a private lawyer wrote you, asking for intervention, and he never heard from you.

Now, what I do not understand is how you can say that you met with the attorneys, and they all agreed that you should not intervene when, with only the exception of Mr. McTeer—and I will get to that in a moment—they all say they never heard from you.

Mr. Reynolds. Senator, you are correct. I did not speak with Frank Parker or indeed any of the attorneys affiliated with him on those cases. When I was asked the question, my frame of reference was in terms of my conversations with Mr. McTeer. He and his lawyers were on a number of those cases. After my trip to Mississippi with Reverend Jackson—Victor McTeer was on that trip—I was in constant communication with him about a number of voting matters, and he was, at least to my mind, basically taking a lead role with regard to the whole effort of the county elections and the county redistrictings. My conversations were with him, and my testimony before the committee had reference only to the fact that I had indeed been in touch with him, and that he had been involved in these, and as I indicated, when the time came at the 11th hour for us to jump into the suits, as I explained, at that time, Victor McTeer felt that it was better that we would stay out, because we had a difference as to what the relief would be. And everybody agreed that the cases were going to be resolved.

Senator Metzenbaum. I will come to Mr. McTeer in 1 minute. But you say that, "We all agreed"—"and the private attorneys"—

not singular, but "attorneys"—you then, at another point, say that, "We all felt that the courts were going to do what was asked in those cases."

Now, other than Mr. McTeer, there was no other lawyer that supports the fact that he even heard from you.

Mr. McTeer says in his affidavit:

> On Thursday, June 13, 1985, Mr. Reynolds telephoned me. I told him in that conversation what I am saying here. I asked Mr. Reynolds to file suit on behalf of the minority residents of the affected counties. The Department took no action. Mr. Reynolds on various occasions explained his reasons for not taking any action, as a result of my continued personal pleas for assistance. I did not agree with Mr. Reynolds' refusal to file those actions.

So we now have your statement that all the attorneys agreed not to go in, that you met with the attorneys, and then your response saying, well, you had been in touch with Mr. McTeer, and that that covered the point; but Mr. McTeer makes it very clear that he did not agree with you, and you have told us at the previous hearing that they all agreed that you should not go in.

How do you explain that total disparity in your testimony and the affidavits that we have and Mr. McTeer's affidavit, saying that he disagreed with you, when you told us that they all agreed?

Mr. REYNOLDS. Well, Senator, I never testified that I met with all the attorneys, and I did not intend for my testimony to be understood that way, and I apologize to the committee if it was misunderstood.

I said that I did indeed talk—in fact, I believe I never said I met with the attorneys. I said I had talked with——

Senator METZENBAUM. Let me read it to you——

The CHAIRMAN. Senator, let him get through his statement. Let him finish his answer, and then ask him anything you want to.

Mr. REYNOLDS. I said I talked to the private attorneys. I also talked to members of my staff. And it was the agreement of all at the time this decision was going down that the courts were going to indeed issue the injunctions. The question was whether, given that reality, we should be getting into the cases at the 11th hour. The theory that we would go in on was a rather novel section 2 theory. The private plaintiffs were in the suits on a very straightforward, malapportionment theory, and indeed, the counties, from our information, were all going to acquiesce in that, and they were going to get the injunctions. If we came in at that 11th hour with our novel section 2 theory, it would be terribly disruptive.

In addition, we would have to come in and state a position contrary to what the plaintiffs were asking with regard to the relief. Our position was that the court should not redistrict these communities but that indeed, what should happen is that the counties should do it, and that it should be submitted back to us for section 5 review. And when we went down to Mississippi in the *Bolivar* case, which was the first one——

Senator METZENBAUM. Well, Mr. Reynolds, I do not want to interrupt, but you are not answering my question. I do not really care what——

The CHAIRMAN. Senator, he has a right to express his statement, and then you can cross-examine him when he is finished.

Senator METZENBAUM. I understand that.

The **Chairman**. I rule that he has a right to finish his statement, and then you can cross-examine him and contradict him, or anything else you want to do.

Go ahead, Mr. Reynolds.

Mr. **Reynolds**. Well, I was just going to add, Senator, that when we went down into Mississippi in the first of those cases in Bolivar County, we filed a section 5 suit. We also sought to intervene as an amicus in that case with regard to the relief question, but Mr. McTeer opposed us in that regard. And we were surprised at that, because he had been asking us to get into the cases.

When I called Mr. McTeer and asked him about that, he said that they were going to win the section 5 issues, and they could win the malapportionment issues, but that he did not see any reason for us to come in if we would not be able to advance the relief side of it that he was urging. It was my understanding at that time—well, it was my staff and my agreement at that time—that we would not be able to endorse that relief aspect of it. Given the timeframe, and given the fact that private suits were filed, I decided that it would be counterproductive to go in at the 11th hour, and thus I stayed out.

My testimony in response to the question was trying to give a rather straightforward and simple answer to an awfully complicated series of events that took place over a very hectic 2- to 3-week period, and really, the question was why we did not get into the suits, and that was the answer that I was trying to give in my testimony earlier.

Senator **Metzenbaum**. Well, Mr. Reynolds, I am not now asking you a question, because it would take too much of my time. But I want to make it clear that you told us that you talked to the private attorneys that were involved in those suits, that it was the agreement of all of them. It is not the fact, according to your present testimony, that you talked to the private attorneys. It is now your testimony that you spoke to Mr. McTeer. And your testimony was that:

> We all felt that the courts were going to do what was asked in those cases—we all felt that—and that the involvement of the Federal Government at the 11th hour would probably be more disruptive.

Mr. McTeer makes it very clear that he did not agree, and so your testimony previously, the only way I can interpret it, was not in accordance with the facts as stated by the private attorneys or as stated by Mr. McTeer.

Now, coming back to the questions that Senator Kennedy was asking you, he questioned you repeatedly about whether there was such a memorandum. He asked you do you know if you put your decisions or your reactions to any of the staff recommendations—did you put any of your reactions to any of these in writing; do you know in any of the Mississippi voting rights cases. At another point, he asked if there was any written records for the changes in the staff position.

At that point, you clearly led us to believe that there were no such memos. As we found out late yesterday afternoon, there is such a memo. In fact, you indicated earlier, the memo was delivered earlier to the committee, according to Senator Mathias' advice to us from the staff, who did not get it until June 14, 10 days after. You said in response to Senator Kennedy, and I quote you: "If you mean a memo in the files, that is correct."

How do you explain the fact that you told Senator Kennedy and led him to believe that there was no such memo, and that indeed, there was such a memo?

Mr. **Reynolds**. Senator, I did not intend to mislead Senator Kennedy or anyone else. What I felt Senator Kennedy was asking me was with regard to memoranda that had not been turned over. We turned over those files to the committee, and made them available for inspection. The document that we are talking about which Senator Kennedy referred to this morning was among the documents we made available in our room for inspection and copying.

What I thought Senator Kennedy was asking me was whether there were additional memos in addition to those that had been reviewed or had been made available relating to these matters that we had not turned over or that were in our files. I have asked my lawyers to search. We do not have any additional information. The materials that we turned over are the same materials that were turned over earlier.

Senator **Metzenbaum**. Would the staff be good enough to advise when did we indeed receive this memo about which we are now speaking?

Mr. **Short**. Senator, it is my understanding that it was made available last evening, at the request issued on June 14 and received at 2 p. m. on June 14.

Senator **Metzenbaum**. And so it was not in our possession, as Mr. Reynolds states, in the earlier group of documents turned over to us, according to your best knowledge?

Mr. **Short**. Senator, I do not know if the documents were available earlier in May—I do not know when that particular document was available. It could have been overlooked at that time.

Mr. **Reynolds**. Senator, we made them available at the Department of Justice, and the staff came down and inspected those documents. The ones that were made available to the committee were the ones that the staff asked us to copy out of the very large volume of documents that were made available in the conference room.

My testimony was to the effect that the documents on these Mississippi cases were all made available in the conference room for review, and my understanding is they were reviewed, and certain of them have been copied, and what was brought up to the committee earlier were only those that the staff had elected to copy.

Senator **Metzenbaum**. Well, how do you explain the fact that Senator Kennedy pressed you as to whether there was any written memo, and you indicated, "If you mean a memo in the files"—that is, he asked you repeatedly if there was any written record for the change in the staff position, and you stated, "If you mean a memo in the files, that is correct," meaning there is none. And now you are saying to us—and I am quite confused—when did this memo appear? When was it delivered to the committee? When did we learn about it, and why didn't you describe it as a memo that the committee had when Senator Kennedy was asking you about a written memo?

Mr. **Reynolds**. Could you give me the reference to the page in the testimony that you are referring to?

Senator **Metzenbaum**. Page 229. "If you mean a memo in the files, that is correct."

[Pause.]

Senator **Metzenbaum**. Senator Kennedy's question was: "This was true. As I understand, as you mentioned, there were"——

The **Chairman**. Senator, your time is up, but I am going to give you a few extra minutes and charge it against a future round, if you would rather have that.

Senator **Metzenbaum**. Thank you, Mr. Chairman. I appreciate that. To continue:

> Senator **Kennedy**. There were 10 different cases where the professional staff had made recommendations to move ahead. Then, as I understand, they reversed their positions, and I understand further there is at least no written record for the reason for the change in their position.
>
> Do I understand it correctly?
>
> Mr. **Reynolds**. If you mean a memo in the files, that is correct.

And yet you say now, and we do know now, that there is a memo.

Mr. **Reynolds**. Senator, my understanding of Senator Kennedy's question—and I believe it was covered also in testimony later, but I cannot find the page now—was that it had reference to what I thought he was referring to, memos in addition to those that we had turned over. We had turned over our files on these, and I knew of no other information other than the files that we turned over on these cases.

So, I was under the impression that Senator Kennedy was asking me with regard to documentation or memorandums in addition to that which we had made available for inspection to the staff of the committee.

Senator **Metzenbaum**. Do you have page 229 before you?

Mr. **Reynolds**. I do have that.

Senator **Metzenbaum**. His question is very simple:

> Then as I understand, they reversed their position, and I understand further there is at least no written record for the reason for the change in their position.
>
> Do I understand it correctly?
>
> If you mean a memo in the files, that is correct.

Now, how could you say that you understood that question to mean something other than that which it says?

Mr. **Reynolds**. Well, I think that my answer on that is correct, that there is no written record of the change of their position. That is precisely correct, Senator. That is exactly—I still do not have any memo that I am aware of that relates to a change of their position. I think that the question on memorandums as I understood it, was whether there were additional memos, and we made them available for copying, and what the committee got was what the staff copied.

Senator **Metzenbaum**. Then, Senator Kennedy asked you at another point, at page 228:

> I am just wondering whether at any time you wrote anything down on your own position, the reasons for it, and the reasons why you believed the staff turned around and reversed their position.
>
> Mr. **Reynolds**. Senator, actually, I believe you are speaking of the 10 Mississippi cases that involved questions of whether elections could go forward in the face of

objections that had been entered by the Department of Justice. The staff had recommended we go into those cases. I had talked to private counsel. I had also talked to the members of my staff who had made that recommendation. After talking

and again, you repeated,

> I think the only writing that addresses that is contained in certain responses that I had made the accusation on prior occasions by some that the reason we didn't go into those 10 cases was for the purpose of disagreeing with the position that the staff wanted to assert, and I gave in response to that accusation I gave the same answer I have given you today, and that is written in certain places where we have issued responses to the accusations.

And again you were saying there was no memo, when in fact, we did receive one late yesterday afternoon.

Mr. **Reynolds**. Well, again, the memo you received late yesterday afternoon says that we should go into the case, but only on count one. It was not a memo saying we should not go in. At that time when I wrote that memo, my reservation was with the section 2 theory, but I said that you can proceed on count one, and given the time constraints, we should go in on that. I still do not know of any memos the other way—and I would ask you, Senator, if you would look at page 232 of the transcript.

Senator Kennedy asks if there is any other information with regard to the Mississippi case, or any other written information that would be of value or use or notes of telephone calls that are available now.

My answer was:

> Senator, I believe the committee made a request for those documents, and we have been very forthcoming in turning them over. I am not aware of other documentation in the files that would bear on those matters.

It was in that regard that I understood the Senator's questions, and I believe that my answers that I gave him were accurate and are accurate.

Senator **Metzenbaum**. Well, Mr. Reynolds, my time has expired, but I just want to say that when my staff yesterday pressed your staff about this particular memo, it was only then that your staff turned it over to the committee at 5:45, and they did not claim in speaking to my staff that that memo had been made available at an earlier point. So I think that there is some clarification or some misunderstanding.

Mr. **Short**. Senator, for the record, it was requested on May 22.

Senator **Metzenbaum**. It was requested by us?

Mr. **Short**. Yes, sir; that is correct.

The **Chairman**. The distinguished Senator from Pennsylvania.

OPENING STATEMENT OF SENATOR ARLEN SPECTER

Senator **Specter**. Thank you, Mr. Chairman.

Mr. Reynolds, there are a number of areas that I would like to ask you about, subject matters that my chief counsel has already told you were of concern to me.

With respect to the question of policy, I quite agree that the President's prerogative is to establish policy, and I believe I understand the bounds of advocacy and respect advocacy, and very strenuous advocacy on the part of a lawyer.

The concerns that I have and will come to in the course of my questioning to you involve the subject of candor in your responses back in 1982 on March 1 in this room, when we took up the voting rights issue, and also, what I am concerned about on what I see to be a pattern, and I want to ask you about this and give you a chance to explain your positions, but a concern that I have about what appears to be a pattern of elevating your own legal judgments over the judgments of the courts stated differently, in disregarding the established law, as you move through the civil rights field, and that, if true, is something that no one under our system can do. We are all obliged to follow the law as it is finally interpreted by the courts.

Let me turn first to the issues surrounding the Voting Rights Act and the so-called *Berks County* case, which has been litigated under a variety of names, including *Rodgers* v. *Lodge*, and a subject that I have questioned you about and others, including Senator Leahy had questioned you about.

This goes back to the March 1, 1982, hearings, when I had raised an issue as to your decision that the *Berks County* case did not involve a violation of the Voting Rights Act, and a statement which you had made on "Nightline" to the effect that, But at the present time, certainly the at-large system in Berks County and in many, many other jurisdictions throughout this country are not the kind of a situation that would violate the law.

And then, I asked you why you had not filed a brief on the subject matter, and you gave a variety of answers, referring at one time to resources—and I am now reading from page 1683 of that record—and at another time, saying that it was not the kind of an issue that you wanted to raise. And I pressed you for your views and for your legal judgment on the case, and you declined to give me or the committee your views on the case, saying that it was a matter in litigation, and when Senator Leahy questioned you about this subject earlier in these proceedings, you had responded to him at page 182 of the record; after Senator Leahy had said:

> So you do not think that there is anything at all contradictory between what you told Senator Specter and myself, and what you wrote to Rex Lee?
>
> Mr. Reynolds. Well, I think what I wrote to Rex Lee was my views on how we should participate in the Rogers case.
>
> Senator Leahy. Your answers to us were not your views?
>
> Mr. Reynolds. You did not ask me my views.

I had flatly asked you for your views, Mr. Reynolds, on March 1, 1982, as you had commented at page 1684 of the record, saying quote, "It would be inappropriate for me to express my personal views where the evidence in a pending case does or does not make out"—and then there was an interruption.

Since the exchange in 1982, the memorandum has come to light on January 4, 1982, from you to Solicitor General Lee, in which you take up the issue as to whether a brief would be filed, and the memorandum says, "As you know, the recommendation of the Appellate Section of Civil Rights Division favored amicus participation by the United States in Rogers in support of appellee." That was the position that there was a violation of the Voting Rights Act.

Then the memorandum goes on to say, "I disagree." That is at page 2. And then at page 3, you say, Regrettably, because I have received the Appellate Section's analysis on recommendation in this case after petitioner's brief on the merits had been filed, the preferred course of action, which would be to participate as amicus supporting petitioners is foreclosed.

You wanted to come in on the other side, that there was not a violation of the voting rights case.

Then you go on to say: "Accordingly, it is my recommendation, albeit with considerable disappointment, that the United States not participate."

Now, with that analog, my question to you directly is, wasn't your response to me deceptive?

Mr. REYNOLDS. Senator, when a case is pending in the Supreme Court, I do not think it is appropriate for internal differences among lawyers of the Justice Department as to how the Solicitor General might proceed in that case, or arguments that might be made—I do not think it is appropriate for those internal decisions to be aired in public, especially when the case is pending.

It seems to me that would be an inappropriate way for us to conduct business on any cases. There was a disagreement in the Department. I held to the view that my internal memo to Rex Lee said, but I do think that it would be inappropriate for me to air those differences of views with regard to a case that is pending in the court. And that was my answer to you at that time. The internal memo reflects my position, and I had stated, publicly, that I had reservations about the opinion, the side of the case that you suggested, but that it had been decided correctly.

Senator SPECTER. Well, Mr. Reynolds, I think you are wrong on that. I do not believe that there is any principle which precludes a party not in the case from making a comment about a case which is pending, and especially in the context where the Senate of the United States is considering the Voting Rights Act and wants to know what the position is of the key governmental official who is in charge of that case and asserting that position.

But if you concluded that it was a matter that should not be discussed, why didn't you say that flatly "This is something I will not discuss" as opposed to saying to me, "Well, there was a question of resources, and this was not the kind of a case where the facts lent itself to our participation," leading me to conclude that you did not believe that there was no violation of the Voting Rights Act.

When I finished my examination of you at that time, I recollect being very concerned about your responses, but there was nothing in that record which would suggest to me that the Assistant Attorney General in charge of the Civil Rights Division had any view other than there was a violation of the Voting Rights Act. And all the time, you felt there was not a violation of the Voting Rights Act.

[Pause.]

Mr. REYNOLDS. Senator, my answers were given with regard to the questions as to why the decision was made not to participate. That decision was made with regard, actually, to participating on the other side of the case. By the time I had gotten it, we could not have participated on the side that I had preferred anyway. And my testimony at that time went to those decisions, those factors that went into the Solicitor General's decision to remain out of the case.

It was a fact-bound case. The legal standard was well settled. And the question was whether the particular facts of this case did fit into that legal standard. It is not the kind of case, usually, that you would have a participation in those circumstances, given the resources of the Solicitor General's Office.

But as I say, I apologize to you if I left an impression otherwise, but I was simply stating what the decision was in the Solicitor General's Office to stay out of the case, and I indicated that I thought it was inappropriate for me to be speaking about differences of opinion of lawyers with regard to internal deliberations relating to pending cases.

Senator **Specter**. Well, Mr. Reynolds, I find that hard to accept in the context of the Senate's obligation to have oversight over the Justice Department and the right of the Senate and a Senator to have a candid expression from a lawyer who occupies such a key position.

Had you felt that you could not discuss it with the committee or with me, then you could have said that. But notwithstanding my pressing you on a number of occasions, as the record shows, you came back to issues of resources, and you came back to issues of the facts are not the kind that we should take up.

Let me phrase another question to you specifically. Do you think that a fair reading of your testimony back on March 1, 1982, led to an inference that you believed there was a violation of the Voting Rights Act but simply did not believe that as a matter of discretion, your office ought to participate in the case?

Mr. **Reynolds**. I think you could have understood it that way, and I apologize to you, Senator, for leaving that impression.

Senator **Specter**. Well, Mr. Reynolds, that is certainly the way that I did interpret it, because on the facts of the *Burke County* case, it seemed to me not reasonable to draw any conclusions other than the conclusion that there was a violation of the Voting Rights Act. And if the position of the Civil Rights Division of the Department of Justice had been expressed to me that the Assistant Attorney General thought there was not a violation of the Voting Rights Act on those facts, I would have thought that some different course ought to be taken by the Senate, in terms of changing the law. But every time we pursued this matter, you diverted my view, my attention, to issues such as resources or just not the kind of facts, when in truth and in fact, as the memorandum shows very plainly, less than 2 months before, you said flatly to the Solicitor General that you thought there was no violation of the Voting Rights Act, and in fact, had you had the choice, you would have gone in on the other side to defend the action of the *Burke County* officials.

Mr. **Reynolds**. That would have been a decision that I would have made, Senator, and there were others who were submitting memos to the Solicitor General with different views, and he was the one who made the decision not to go in based on the factors that we talked about. But I think that it is accurate to say that, based on that testimony, if you drew that inference, I can understand that, and I apologize.

Senator **Specter**. Well, I am not concerned with what the Solicitor General did, because we did not have him here, trying to find out what the position was of the U.S. Government, or the Assistant Attorney General of the Civil Rights Division.

I am concerned about what you said. And there is precious little time on the oversight function, given what we all have to do, to have extended discussions which are anything other than full and frank and candid, especially between two lawyers, like Brad Reynolds and Arlen Specter.

And I would ask you as a followup, why didn't you call me and say, "I didn't want to tell you in front of the world, but from one lawyer to another, I think the people who are claiming a voting rights violation in Burke County are wrong, and that's my view," and then we could have talked about it, so I would have known what was going on? Did you consider informing me of your position privately as opposed to publicly?

Mr. REYNOLDS. I do not believe I did consider that, Senator.

Senator SPECTER. Let me take up the facts of the *Burke County* case, Mr. Reynolds, because I am concerned about the underlying merits of it today, as to how you could come to the position which you did. And this is a question I would have pursued at greater length on March 1, 1982, had I known that you disagreed there was a violation of the Voting Rights Act.

The CHAIRMAN. The gentleman's time has expired.

Senator SPECTER. May I finish this question, Mr. Chairman?

The CHAIRMAN. Yes, you may finish your question.

Senator SPECTER. At the March 1 hearing, I asked you about the findings as related in the court of appeals opinion at pages, 1376 and 1377 of Fed Sec., an opinion subsequently upheld by the U.S. Supreme Court, in a 6 to 3 decision upholding these findings of fact. And this is what the Court said the underlying facts were in Burke County, which led the district court and then the court of appeals, and ultimately, the Supreme Court of the United States, to conclude that there was a violation of the Voting Rights Act. And my question to you, Mr. Reynolds, after I recite this is, how on the face of these factual determinations did you conclude that there was not a violation of the Voting Rights Act? This is the Court's opinion.

> After considering exhaustive evidence on the subject, the court found that the county commissioners demonstrated their unresponsiveness to the particularized needs of the black community by first, allowing some blacks to continue to be educated in largely segregated and clearly inferior schools; second, failing to hire more than a token number of blacks for county jobs and paying those blacks hired lower salaries than their white counterparts; third, appointing extremely few blacks to the numerous boards and committees that oversee the execution of the county government, particularly those groups such as the committee overseeing the Department of Family and Children's Services, whose function is to monitor agencies of the county government that work primarily with blacks; fourth, failing to appoint any blacks to the Judge Selection Committee with respect to the appointment of a judge for the Burke County Small Claims Court, despite the fact that most of the defendants in that court are black; fifth, making road-paving decisions in a manner so as to ignore the legitimate interests of the county's black residents; sixth, forcing black residents to take legal action to protect their rights in integrated schools and grand juries and to register and vote without interference; and seventh, participating in the formation of, and in fact, contributing public funds to the operation of a private school established to circumvent the requirements of integration.

My question to you, Mr. Reynolds: How, in the face of those facts, could you conclude there was no violation of the Voting Rights Act?

Mr. REYNOLDS. Senator, the standard in the Voting Rights Act was the *Bolden* standard, and the question was whether there was discriminatory purpose to make it unconstitutional, and there was—the at-large system in Burke County was one where the percentage of the black population, the voting age population, was in excess of 50 percent. There had been no requests made even to change the at-large system or to alter it to a redistricting. And given the *Bolden* case, and the facts there, and the decision that the Supreme Court made in that case, it was my view that the at-large system was not one that was in place and being maintained for a racial purpose.

The point of departure, I think, if you will, was that the Court said in *Bolden* that you look at those factors that you just talked about, and in addition to that, you have to find some indicia that the reason they were maintaining the at-large system was because of race. The problem with the case, as I saw it, was that as far as the opportunities for election and participation in the electoral process in the at-large system were concerned with a well-in-excess of 50-percent voting age population in the at-large system, there was an ample opportunity for the blacks to elect in an at-large system people of their choice, if they registered and voted, and that there was nobody who had gone to the legislature and asked the legislature to change the system, so that it was being maintained, but not in the face of requests to change it by anyone. Nor is it a situation where, as in *Bolden,* you had less than a majority of the voting age population who were complaining that they could not participate in the elections and elect individuals of their choice.

Those factors were all factors that had to be treated, and legitimately should be treated, with regard to discrete areas of discrimination in Burke County.

My feeling was that a change of the at-large system was not treating with the underlying causes for the problems that you listed, and that there was nothing—given the population makeup, and given the fact that no one had gone back and asked for any change—there was nothing to suggest that there was a purpose there to maintain that particular system to deprive blacks of an opportunity to have full participation in the process.

Senator SPECTER. Well, Mr. Reynolds, what you are saying——

The CHAIRMAN. Senator, you have had a great deal of extra time. Are you about through?

Senator SPECTER. I think so, for this round.

Mr. Reynolds, I understand what you are saying, but the central question, as you define it yourself, is whether there was a discriminatory purpose or a racial purpose. And it seems to me hard to find a more egregious set of facts as articulated by the Court. I have read many, many cases, and I do not know of one that rises to this level of specification of discriminatory or racial purpose. So it is hard for me to see how you could conclude that there was not a very forceful showing of a discriminatory or racial purpose.

Thank you, Mr. Reynolds.

Thank you, Mr. Chairman.

The **Chairman**. The distinguished Senator from Arizona.

Senator **DeConcini**. Mr. Chairman, thank you.

Mr. Reynolds, I have just a couple of questions. One is more in the general sense of my concern about what appears to be the different interpretation of your previous answers relative to cases and your discussing these cases with the counsel on the other side—mainly, the Mississippi and the Louisiana cases. Let me just paraphrase it.

It is fair to say that, No. 1, when you spoke with Mr. McTeer, though there is some disagreement as to what that conversation was based on his affidavit, in your mind at the time, that was tantamount to speaking to counsel for all of the cases that he was involved in?

Mr. **Reynolds**. All the ones he was involved in, that is correct, Senator.

Senator **DeConcini**. So in your mind, that was discussing all those cases and not any other counsel; is that right?

Mr. **Reynolds**. I did not speak with any of the counsel in the other cases, no. They were just the counsel in his cases.

Senator **DeConcini**. Yes. And then the other four, five, or six cases, whatever it was, was it your testimony that you did speak or you did not speak to other counsel?

Mr. **Reynolds**. I personally did not speak to other counsel. People in my office did.

Senator **DeConcini**. Did you believe that you had? Is that what you thought, and you found that you had made a mistake?

Mr. **Reynolds**. No, I have never spoken—my recollection is I did not speak to the other counsel in the cases. These were all cases that were of the same nature; they were moving very fast, and I was in contact with Victor McTeer, who had five of them, and they were all, in essence, a package that we were treating with. And my reference in my testimony that I gave on the 4th and I gave today was solely with respect to my conversations with Victor McTeer and his cases.

Senator **DeConcini**. Then, as to the other case, where you tasked your log and found out that, in fact, your staff had met with counsel, as I understand your testimony here today, you thought you had done it, but your records demonstrated that you did not, and your answer is today that, "No, I did not. I thought I did, but my staff had."

Is that accurate?

Mr. **Reynolds**. That is accurate, yes, Senator.

Senator **DeConcini**. OK. Now, were you involved in the civil rights reverse discrimination case in Birmingham, AL after a consent decree had been entered into with the city of Birmingham in 1981?

Mr. **Reynolds**. We are involved in that case, yes, Senator.

Senator **DeConcini**. You are, yes. And were you personally involved in that case? I mean, did you participate in the case at all?

Mr. **Reynolds**. Certainly—well, yes. I mean, there are lawyers on my staff who were doing it, but I have been involved in it, and——

Senator **DeConcini**. You were involved in it.

Mr. **Reynolds**. Yes, sir.

Senator DECONCINI. To your knowledge, in the course of taking depositions and proceeding with the case, did you authorize at any time, your Department or your lawyers to ask the FBI for investigation of confidential files regarding some of the particular plaintiffs in that case?

Mr. REYNOLDS. If you are asking if I personally did, I do not have any knowledge of doing that.

Senator DECONCINI. Do you have any knowledge of anybody doing that?

Mr. REYNOLDS [conferring with Ms. Mann]. I am told, Senator, that the FBI was asked to assist us in locating victims, and there was one matter with regard to an individual with a criminal record, and we asked the FBI to help us investigate that matter.

Senator DECONCINI. Was that one of the parties in the litigation?

Mr. REYNOLDS [conferring with Ms. Mann.] He was not a party to the case, but somebody who had come to testify, and there were some discrepancies in his testimony, and the question was—we called the FBI in to resolve those discrepancies.

Senator DECONCINI. You called the FBI to resolve the discrepancies, by what manner?

Mr. REYNOLDS. Well, as I understand, it had something to do with a criminal record, and I really do not have any personal knowledge on that, but——

Senator DECONCINI. Is that a standard procedure that you would call on the FBI when you have a discrepancy of some potential witness?

Mr. REYNOLDS. Well, I think if it it involves a criminal—I am sorry, I am not personally involved——

The CHAIRMAN. If you wish to let your staff member make a statement on that, it would be all right with the committee, if you are not familiar with it. If you are not familiar with it, just say so.

Mr. REYNOLDS. Mary Mann, who is on my staff, and is a special assistant involved in these cases, does have knowledge of that.

Would you like a statement from her?

Senator DECONCINI. I would, yes. Please, take a chair.

The CHAIRMAN. Hold up your hand and be sworn.

Do you swear that the testimony you will give in this hearing will be the truth, the whole truth, and nothing but the truth, so help you, God?

Ms. MANN. I do.

TESTIMONY OF MARY MANN, SPECIAL LITIGATION COUNSEL, CIVIL RIGHTS DIVISION

Senator DECONCINI. What is your name, madam?

Ms. MANN. Mary Mann. I am special litigation counsel.

Senator, the only requests that were ever made of the FBI for information, either in the *United States* v. *Jefferson County* litigation or the Birmingham reverse discrimination employment litigation, to the best of my knowledge, arose in two areas. In the reverse discrimination cases, on one occasion, we were taking a witness' deposition. There were some discrepancies that arose, or ambiguities, concerning a criminal record. And a telephone call was made to the FBI. We said, "Do you have any information concerning this individual?"

That was the only——

Senator DECONCINI. Why would you ask the FBI for that information? Is that standard procedure? Is that what you do whenever you have a discrepancy with a witness, you ask the FBI to investigate for you?

Ms. MANN. Senator, I believe that any good lawyer would attempt to verify information in a deposition. It was a matter where there was substantial discrepancy, there was substantial ambiguity. We obtained certain information. When the deposition was reconvened, we asked the witness further questions about this criminal record. And that was the only request that was ever made in the Birmingham reverse discrimination cases.

The only other information that I am aware of that was ever requested from the FBI was in connection with the Jefferson County litigation. As I understand it, the attorney that was in charge of the litigation was having difficulty locating some of the victims and the individuals that were entitled to make-whole relief. The FBI was called in and asked to help locate these people.

Senator DECONCINI. Well, Ms. Mann, in the *Birmingham* case, you did get some information from the FBI regarding this particular witness or party; is that right? The FBI supplied you with some information?

Ms. MANN. Yes, they did, and it has been supplied——

Senator DECONCINI. And what did you do with that information?

Ms. MANN. We reviewed it, and some questions were asked of the witness when the deposition was reconvened, and that information has been shared with all counsel of record in the litigation.

Senator DECONCINI. You did turn that information over to Raymond Fitzpatrick, who was one of the attorneys?

Ms. MANN. It was shared with Mr. Fitzpatrick, and it has also been shared with the attorneys for the defendants, for the city, and for the Martin intervenors.

Senator DECONCINI. Now, you wrote a letter to Mr. Fitzpatrick, dated November 26, 1984. Are you familiar with that letter?

Ms. MANN. I would like to refresh my recollection if I could, sir.

Senator DECONCINI [handing document to Ms. Mann]. Yes. If you would just take a quick look at that letter—you can keep that one; I have another copy here.

The CHAIRMAN. Senator, do you want this to be placed in the record at this point?

Senator DECONCINI. I will put it in the record in just a minute, Mr. Chairman.

Is that your letter, Ms. Mann?

Ms. MANN. No, sir. This is not my letter. It appears to be a typed copy that someone else made. But this is not the letter.

Senator DECONCINI. Is this a copy of your letter?

Ms. MANN. No, sir, it is not.

Senator DECONCINI. This is not your letter?

Ms. MANN. No, it is not.

Senator DECONCINI. Even though your name appears at the bottom?

Ms. MANN. Senator, my name appears at the bottom, but I did not sign this. As I said, it appears that this is a copy that someone else had prepared from my letter, but this was not my letter.

Senator DECONCINI. Do you have a copy of your letter to Mr. Fitzpatrick, transmitting this information?

Ms. MANN. I am sure we do. It would be located in our files.

Senator DECONCINI. Would you supply it to us.

Ms. MANN. Yes, we will. I would point out that it was made available pursuant to an earlier document request.

Senator DECONCINI. Now, what is your explanation of this letter? Do you have any explanation of this letter—though it is not signed by you. Is this a fabrication in your judgment?

Ms. MANN. Senator, I think this letter is absolutely accurate, and I think it correctly reflects what was contained in my letter.

As I indicated previously, a discrepancy or an ambiguity came up in this individual's testimony. I would have to go back and look at the record.

Senator DECONCINI. Ms. Mann, is it safe to say in your recollection here—and we will clarify it by the actual letter that you will get for us—is it safe to say that this letter represents, and pretty much is what you remember, the transmittal letter from you to Mr. Fitzpatrick was?

Ms. MANN. That is correct

Senator DECONCINI. OK. Now, in this document, in this letter here, you indicate that you are sending documents that you received from the sheriff's office, that various other information may be available. Did you, or do you recall, did you send the FBI information with this letter, with the accurate copy of this letter, to Mr. Fitzpatrick?

[Pause.]

Ms. MANN. Senator, I believe that the FBI information was not sent with this letter. I believe it was just documents that we obtained from the sheriff's office in Beaufort, SC, and those——

Senator DECONCINI. The letter indicates that, "The FBI is also forwarding to me copies of the same as soon as they are received," et cetera. So from your recollection, the FBI material did not go with this letter?

Ms. MANN. I believe that is correct.

Senator DECONCINI. Was the FBI material later forwarded or made available to Mr. Fitzpatrick?

Ms. MANN. Senator, yes, it was, and it was also made available to all counsel of record.

Senator DECONCINI. On all sides of the matter?

Ms. MANN. That is correct.

Senator DECONCINI. Now, give me another just summary of why is this procedure, in your judgment appropriate, to use the FBI?

Ms. MANN. Senator, as I testified earlier, to the best of my recollection, this was an individual who had filled in an application for employment in Birmingham, and I would prefer not to disclose his name——

Senator DECONCINI. I am looking at his name right now, thank you.

Ms. MANN. Excuse me, sir?

Senator DECONCINI. Go ahead.

Ms. **Mann**. As I recall, there had been a statement in his employment application concerning his arrest record. During his deposition while he was under oath, and he was sworn to tell the truth, we asked him some questions concerning whether or not he had ever been arrested or convicted of a crime, and he responded to those questions. And I remember that there was a substantial ambiguity concerning part of his testimony, and it would have some bearing on whether or not the information he had supplied in his original application was true or false.

We attempted to clear up this ambiguity. It was a situation where he testified that he had never been arrested, but he had spent 3 months in prison. There were things that just did not make sense, and so we tried to determine what, in fact, was the true situation. And in fact, when his deposition was reconvened, we asked him questions concerning his earlier testimony and gave him every opportunity to clear it up.

Senator **DeConcini**. Mr. Chairman, if I can just finish here.

The **Chairman**. Go ahead.

Senator **DeConcini**. Under what authority did you believe you could turn a confidential FBI record over to all of the counsel of record? Is that a policy in the Civil Rights Division to do that—maybe I should ask Mr. Reynolds that, but——

Ms. **Mann**. Senator, I would have to—we have taken many, many depositions, and I reviewed many, many personnel files in these cases. I cannot even recall at this time specifically what the FBI sent us. But certainly, much of the information that we had was a matter of public record. I cannot recall at this time whether or not there was any information that I did not——

Senator **DeConcini**. Did it occur to you that the Privacy Act might be involved here as to this individual before you turned over the FBI file on him to all the counsel of record?

Ms. **Mann**. Senator, again, I would have to look at the information that was turned over. I cannot recall at this time specifically what it was that we obtained.

Senator **DeConcini**. Do you have available that information in the file, do you know?

Ms. **Mann**. Yes, we certainly do.

Senator **DeConcini**. Mr. Charman, I would like to ask the witness if she would supply all of the information regarding the FBI record on this unnamed person that is referred to in the letter.

The **Chairman**. Could you obtain that information and come back after lunch today with that information?

Ms. **Mann**. Yes, Mr. Chairman, I would be glad to.

Senator **DeConcini**. Thank you, Mr. Chairman.

Then, as to Mr. Reynolds, if I could just ask you one question——

Senator **Heflin**. Before Ms. Mann leaves, I wonder if I might ask her some questions, since this is of interest to me.

Senator **DeConcini**. Yes, go right ahead. I would be glad to yield to you.

Senator **Heflin**. Ms. Mann, one of the issues asked during this hearing is whether there was compliance with a consent decree which the Department of Justice under Mr. Reynolds helped negotiate and fashion and agreed to on August 21, 1981, with the city of Birmingham. And then, prior to the *Stotts* decision, there were two cases brought by plaintiffs charging reverse discrimination. Before *Stotts* was rendered by the Supreme Court the Department of Justice intervened on behalf of the reverse discrimination plaintiffs.

The consent decree stated that it was the obligation and the duty of the Department of Justice to defend the consent decree. Interpretations may vary—I will ask Mr. Reynolds about this later—but the position of the city of Birmingham is that there was a failure to comply with the terms of the consent decree, and that the Department of Justice did not defend it prior to *Stotts,* but actually intervened on behalf of the plaintiffs, instead of intervening on behalf of the defendants, or either assuming an amicus curiae role in this litigation. Mr. Raymond Fitzpatrick is one of the attorneys for the reverse discrimination plaintiffs. The information I have is that in cooperation with Mr. Fitzpatrick the Department, used the FBI to try to investigate some of the blacks that had been hired. Therefore, this is an instance of a failure to comply with the consent decree and a failure to live up to the obligations of the Department of Justice to defend that decree before *Stotts,* and it is alleged that this information was furnished to the lawyer for the reverse discrimination plaintiffs, to be used by him during a deposition, to try to impeach a black that had been hired.

Now, with that in mind, in your testimony to Senator DeConcini, you stated that you shared this with Mr. Fitzpatrick, and then as I understood your words, you said, "Then, we shared it with the other counsel."

What was the timeframe between the sharing of the information with Mr. Fitzpatrick, the attorney for the reverse discrimination plaintiff, and with the counsel for the defendents?

Ms. **Mann**. Senator, the information was shared with defense counsel, counsel for the city, and counsel for the Martin intervenors, pursuant to their serving us with a request for production of documents. We felt that this information was responsive to their document request, and as soon as the documents were produced for them, it was produced at that time.

I cannot recall specifically when the deposition of this individual was taken. I would gather from this letter that the deposition probably was taken around the beginning of December—or, was continued around the beginning of December. We produced this information for the city and for the Martin intervenors last week.

Senator **Heflin**. Well, was this information shared with the counsel for the city of Birmingham after the deposition or before the deposition?

Ms. **Mann**. To the best of my recollection, the first time that we actually produced the document for them was after the deposition——

Senator **Heflin**. This is the city, now, you are talking about?

Ms. **Mann**. Yes, sir; I believe it was after the deposition. I do not recall—I do not believe it was shown to them during the deposition. I might add, Senator, that——

Senator **Heflin**. If it were shown, afterward, the deposition, then the city would have been surprised and it would have been a partisan act in behalf of Mr. Fitzpatrick and the attorneys representing the reverse discrimination plaintiffs, would it not?

Ms. **Mann**. No, Senator; as I indicated previously, this information was obtained simply because there was an ambiguity in this individual's deposition. There had been no prior request for this information, and as soon as we produced documents, we made it available. We at no time tried to hide this information, and we questioned this person about the information, as I recall.

I should also add that this was the one instance where we did call to determine whether or not there was a record on this person. It was the only instance. And I must say that I did not request Mr. Reynolds' permission to do this. If there was any impropriety in it, I personally have to take full responsibility. And I will add, Senator, I was relatively new at the time, and if there was any impropriety, of which I am not aware, I personally will have to take full responsibility.

Senator **DeConcini**. Ms. Mann, if I could just say—did Mr. Fitzpatrick request this information from you, or did you voluntarily send it to him?

Ms. **Mann**. I am sorry, Senator, I do not recall. As best I remember it was a situation where the discrepancy arose, and we discussed what we could do to clear up this ambiguity concerning this individual's arrest record. And as I would do in any situation I said, "Well, call the clerk of the court, and find out if this person has a record," and I am sure that I suggested that I contact the FBI to determine whether there was a record. I do not recall, though, whether or not we received any information that was not a matter of public record. I would have to go back and look at the files.

Senator **DeConcini**. You are going to find out for us, right?

Ms. **Mann**. That is right.

Senator **DeConcini**. And is this a policy whenever there is a discrepancy of some witness, do you call the FBI and ask them for a background check on the person?

Ms. **Mann**. No, sir.

Senator **DeConcini**. No?

Ms. **Mann**. No; this was just a situation where it concerned a very specific item. We thought it was important to determine. I will say that as an attorney, it is my policy that if there is a discrepancy or ambiguity in someone's deposition, that I would make every effort to determine whether or not the information I received was accurate and to try and clear up the ambiguity.

Senator **DeConcini**. Did Mr. Reynolds approve this particular situation?

Ms. **Mann**. I can very candidly say that Mr. Reynolds, to the best—well, to the best of my knowledge, he had absolutely no knowledge of this, and I am quite sure this is the first he has ever heard of it today. I never discussed it with him.

Senator **Heflin**. Well, let me ask you one other question. At the top of the letter, where it has in caps "WmBR:cec:MEM" and then "11/26" on, does that mean "William Bradford Reynolds"—is that an initial that would indicate anything at the top of that letter?

Ms. **Mann**. Senator, again, as I indicated, this is not a copy of my letter. This is a copy that somebody else had typed.

Senator HEFLIN. Well, it is my understanding that this was just seen in the last day or so, when it was a matter being dictated—I think we would all profit by seeing the original letter.

Ms. MANN. Senator, I have no personal knowledge of how this was obtained, except that this letter was made available during a document request last week.

But I believe that the standard practice in the division when letters are typed is that, in fact, generally, they are signed "William Bradford Reynolds by Mary E. Mann," and I think that Mr. Reynolds' initials were just put on there as a matter of course. But I do not believe that a copy of the letter was sent to him. I do not send him copies of all of my correspondence or all of the pleadings in this case, nor all of the documents that are obtained.

Senator HEFLIN. Well, I can understand that. I get about 2,000 letters a week myself, and I wonder what goes out under my name——

Senator DECONCINI. Checks, maybe? [Laughter.]

Mr. Chairman, if I could just ask Mr. Reynolds, and then I will come back later——

Senator BIDEN. Before she leaves, could I just ask one question?

Senator DECONCINI. Certainly. I will yield to the Senator from Delaware.

Senator BIDEN. Do I understand, Ms. Mann, that you do not recall whether or not Mr. Fitzpatrick requested the information or not, or you volunteered it—you don't recall?

Ms. MANN. I cannot say who initiated that, and again, I do not even recall specifically what information we obtained from the FBI. I know that we obtained——

Senator BIDEN. But you are going to get that for us.

Ms. MANN. Yes, and I hope that my records will indicate what came from the FBI and what came from the other clerks of court. We were just trying to track down some information on this individual's criminal record because there was an ambiguity in his testimony.

Senator BIDEN. The second question I have—you do recall, though, that the information was shared with the defendants only upon their request. You are positive of that. You did not volunteer this information to the defendants. You may have to Mr. Fitzpatrick—you do not recall—but you are sure you did not to the defendant, is that correct?

Ms. MANN. That is correct.

Senator BIDEN. That is correct.

Senator DECONCINI. Thank you.

Mr. Chairman, if I could just ask Mr. Reynolds whether or not he is familiar with this letter.

Mr. REYNOLDS. I need to see a copy of the letter.

Senator DECONCINI. Ms. Mann has it there—and granted, that is not the original letter. It appears to be a typed copy of it.

Have you ever seen that letter?

Mr. REYNOLDS. I have never seen this letter before, Senator.

Senator DECONCINI. If the initials on top of that letter turn out to be yours when we get the original letter, would you have any idea why they would be there?

Mr. **Reynolds**. Well, I am not sure I know why they are there. I think that the testimony of Ms. Mann is accurate with regard to standard office procedure, but I am not sure why——

Senator **DeConcini**. What is it—would you give us the standard office procedure that your initial would appear, even though you had not seen the letter or something, because it was under your jurisdiction or something?

Mr. **Reynolds**. Well, there are an awful lot of letters that go out of the office where it is signed "William Bradford Reynolds" and then by somebody else. I do not see a lot of those letters.

Senator **DeConcini**. That is what this might refer to?

Mr. **Reynolds**. I really have no idea what it does refer to, Senator.

Senator **DeConcini**. Are you aware that your Department asked the FBI, asks them when they have discrepancies on witnesses?

Mr. **Reynolds**. This is the first I have heard of this instance, so I was not aware of this.

Senator **DeConcini**. Do you know that they do it at any other time—have they done it at any other time?

Ms. **Reynolds**. Well, the resources of the FBI are available to investigate matters where we need to have investigation, and in appropriate cases, we certainly do ask for their assistance in investigation.

Senator **DeConcini**. You have never authorized the use of this for ambiguities of witnesses?

Mr. **Reynolds**. At this moment, I do not have any recollection of a specific instance.

Senator **DeConcini**. Thank you, Mr. Chairman.

Mr. Chairman, I would like to put this in the record with the understanding that it is not signed by Ms. Mann, and just for the purposes of our discussion here, I would like to have this in the record. I would just as soon have it in the record now, Mr. Chairman, if the Chairman does not object, and then I would like to have the original one put in also when we return.

The **Chairman**. Without objection.

[Aforementioned material follows:]

"WmBR:CEC:MEM11/26/84BLT"

"November 26, 1984"

"Raymond P. Fitzpatrick, Jr., Esq.
Fitzpatrick & Jordan
1009 Park Place Tower
Birmingham, Alabama 35203

Birmingham Reverse Discrimination Employment Litigation--[name deleted]

Dear Ray:

Enclosed please find a copy of the documents I received from Beaufort, South Carolina, Sheriff's Office concerning [name deleted]. I am retaining the original certified copy in my file. Please let me know if you need this original.

As I have indicated to you in our telephone conversation today I have also contacted the Clerk of the Superior Court of Davie County, North Carolina, concerning [name deleted] arrest record and she has agreed to forward to me certified copies of his arrest filed in connection with the February 25, 1969, trial for driving without insurance, and without a driver's license, and the November 5, 1969 trial for possession for sale of drugs. The FBI is also forwarding to me copies of the same as soon as they are received. Please let me know the outcome of your inquiry with the Birmingham Police Department concerning [name deleted] 1966 arrest. I would also appreciate your forwarding copies to me of the information you obtained from the Clerk's Office in Beaufort, South Carolina.

I will look forward to seeing you later this week.

With best regards, I am

Very truly yours,

Mary E. Mann
Special Litigation Counsel
Civil Rights Division

Copies to Records Section and CHRON
Enclosures: Subject Files"

The distinguished Senator from Kentucky.

Senator McConnell. Mr. Chairman, if I may, due to the lateness of the hour, I apologize to the witness for not being here this morning, but I have been briefed by staff as to what has transpired——

Senator Biden. Excuse me, Mr. Chairman. Before the Senator from Kentucky begins, we informed everyone we were going to break at 12:30 until 2. Is that the chairman's decision——

The Chairman. If that is what you want to do, we will do that.

Senator Biden. Yes; we have a caucus going on.

Senator McConnell. I might say to the Senator from Delaware, that this is going to take about 1 minute.

Senator Biden. Oh, fine, good; I just wanted to make sure I heard what you had to say.

Senator McConnell. As I was saying, I have been briefed by staff of what has transpired here this morning, and I have a statement that I want to ask to be inserted in the record, Mr. Chairman. Let me indicate that unless something comes to light in subsequent events that has not been uncovered this morning, it is my intention to support the nominee. I think he will do an outstanding job.

And with the insertion of my statement in the record, Mr. Chairman, you may recess us, if you'd like.

[Statement follows:]

Prepared Statement of Senator McConnell

I find it interesting that my colleagues opposing this nomination initially focused their attention, and that of this committee, on the nature of the policies pursued over the last four years by the Civil Rights Division of the Department of Justice. Now, after two days of hearings, and dozens of witnesses, that approach has been abandoned. Rather, we are told, the question has become the credibility and integrity of Mr. Reynolds.

I agree that Mr. Reynold's credibility is an issue, and in my judgement it is the only issue these hearings have addressed that is relevant to the nomination.

I had some initial questions in that regard myself, as a result of Mr. Reynolds' testimony and private conversations. I am now satisfied, based on subsequent conversations and information, that the questions of Mr. Reynolds' credibility that led to this hearing today are without foundation.

I also find it a little disturbing that the process undertaken by this committee in these confirmation hearings has moved first from a forum for criticism of the administration's policies to what appears now to be a search for some conflict in Mr. Reynolds' testimony, however minor or understandable, that might suggest in some way that Mr. Reynolds has been less than completely candid and forthright. The evidence is that any inconsistencies were inadvertent, not intentional.

I will be reviewing Mr. Reynold's testimony and conferring with my colleagues and staff, but unless I'm made aware of something unforeseen, I look forward to supporting Mr. Reynolds' nomination and sending it to the full Senate.

Thank you, Mr. Chairman.

The Chairman. Mr. Reynolds, I want to make this statement. As I understood, Senator Mathias asked for this additional meeting because you made some statements which were contradicted by other witnesses that needed to be cleared up. That is the main purpose of this hearing.

I want to ask you this question. I believe the Voting Rights Section handles approximately 12,000 to 15,000 suggested changes a year. And under your tenure, I believe the Civil Rights Section has handled about 50,000 proposed changes.

The main question here seems to be whether you made an unintentional error or whether you intentionally misled this committee. I want to ask you this one question: Was it ever your intent when you previously testified or today, to mislead this committee, or if any statement was made that was incorrect, that it was an oversight and an error? Would you please answer directly on that?

Mr. REYNOLDS. There was absolutely never any intent and never has been any intent on my part to mislead this committee. I have spoken as forthrightly, honestly, and truthfully as I possibly can, and to the best of my recollection, Senator. As I indicated earlier, there are some instances where my recollection may have failed me a bit, but I at no time had any intention to speak other than the truth, the whole truth, and nothing but the truth, to the very best of my recollection, both in prior appearances before this committee and today.

The CHAIRMAN. With all the matters that the Civil Rights handles, of course, you cannot be familiar with all of them. As I said, your Section handles about 50,000 cases, and you have to depend upon staff to a great extent.

But the point raised here is whether or not you made statements here before that were incorrect and untrue, and if there were mistakes, you have had a chance to correct them, or if you misled the committee, that is another thing, and that is what this hearing is mostly about today.

Do you have any further statement you want to make on that?

Mr. REYNOLDS. Senator, I have not tried to mislead the committee, or in anything that I have said intended to mislead the committee. If there has been some confusion or ambiguity on testimony, I welcome the opportunity to come back up here and clear it up. I have spoken as truthfully as I possibly can and know how, and to the very fullest and best of my recollection throughout my appearance before this committee, at all times.

Senator BIDEN. Mr. Chairman, before you hit the gavel, I just want to make it clear for some of us, and most with whom I have spoken, that the issue is neither whether or not the witness intentionally misled the committee, nor whether he is for busing or for quotas or against busing or against quotas. It is how he interprets the law and whether or not he understands and vigorously pursues the law. That is the issue for most of us. It may be discrepancies from the chairman's standpoint, but not from mine. I do not know of any of those.

Mr. REYNOLDS. Thank you, Senator.

The CHAIRMAN. Well, we have no objection, of course, to that being discussed, too, but Senator Mathias, who asked me to call the meeting, wanted to call it to clear up some statements that were contradicated by other witnesses.

Senator BIDEN. Well, that may be for Senator Mathias, but I wanted to make it clear that Senator Mathias is not this Senator.

The CHAIRMAN. But I certainly, as chairman, have no desire to keep out any testimony along the lines you mentioned.

Senator BIDEN. Thank you.

The CHAIRMAN. We are now going to recess until 2. We have a Superfund meeting that will follow the end of this hearing.

[Whereupon, at 12:40 p.m., the committee was recessed, to reconvene at 2 o'clock p.m. this same day.]

[The committee reconvened at 2:50 p.m., Hon. Strom Thurmond, chairman of the committee, presiding.]

The CHAIRMAN. The committee will come to order.

The distinguished Senator from Utah.

Senator HATCH. Mr. Reynolds, I understand Senator Specter is going to come back so that you can clarify some of the matters that you had brought up. I would just like to say that during your 5 years as Assistant Attorney General for civil rights, you have been on the cutting edge of one of the most controversial and divisive issues in modern American society.

As I view it, you have presided over somewhere between 60 and 75,000 preclearance petitions, or preclearance submissions, in and of themselves. Now, you have not made a personal decision in every one of those, but you have made a lot of decisions on the controversial ones.

And sometimes you have one side for you and another side against you in these very difficult and divisive areas. I think you have had to set administration policy in hundreds or perhaps thousands of other cases in proposed civil rights lawsuits, proposed interventions and proposed aminus preparations.

You have had to review thousands of pleadings and other filings during the last 5 years. You have had to assess hundreds of proposed Federal rules and regulations. I happen to know how much work you have put into these kinds of areas. You have had to evaluate dozens of legislative initiatives, some of which have been the most difficult Congress has seen in many, many decades; there is just no question about it.

And you have participated in thousands of meetings with staff people, with Members of Congress, with attorneys, and with members of the civil rights community and other communities. In addition, you have testified—I happen to know this personally—on countless occasions up here on Capitol Hill before Senate and House committees and subcommittees, including more than 10 hours of intense testimony before this committee just 2 weeks ago.

The transcript of this hearing alone before today runs over 500 pages. I do not know anybody unless it was Mr. Meese, who has gone through this type of lengthy confirmation process.

Now, despite this history, despite intense interrogation by members on both sides of this panel, despite a record number of witnesses who have offered testimony, and despite teams of attorneys scrutinizing with microscopic intensity every statement uttered by you, Mr. Reynolds, despite the most meticulous parsing of every spoken work you have given, I personally believe that those who oppose you have come away emptyhanded.

Now, what is the case against you? Assuming that everything be resolved to the detriment of you—and I presume that the issues that Senator Specter has raised, he will be able to question you further on, and hopefully that can be resolved.

One objection was that you issued an expletive in the heat of battle against your political adversaries. I have known that to occur around here on occasion.

Senator BIDEN. Even not in the heat of battle.

Senator **Hatch**. Even not in the heat of battle, Joe says.

Your judgment differed with that of the civil rights community in a single one of 50,000—actually, 60 to 75,000 preclearance decisions made over the past half decade. Now, there may be more to it than that; but what has been made of it so far, as I see it, is that your recollection was faulty when you asserted that you, rather than your staff, met with attorneys in a single one of several dozen pending redistricting lawsuits.

Now, you know, you did say "we, we, we," throughout the process. I presume that the record shows that and would indicate that you were talking about you and your people, speaking as one.

Is there any serious evidence here, really, that Mr. Reynolds is not a highly competent attorney, a highly ethical human being? Is there any serious evidence that you are not a man of integrity or honor? I have not seen any such evidence.

Is there any serious evidence that you are not carrying out the policies of the man who was overwhelmingly elected nearly a year ago.

Is there any serious evidence that your views on a colorblind society are so far out of the mainstream of American society or so inconsistent with the Constitution and laws of the United States that they amount to a breach of conduct?

And finally, does anybody in this room, any member of this body, have the slightest doubt that the thin fabric of the case against Mr. Reynolds is directly related to your posture on racial quotas and preferential treatment based upon pigmentation and colorblind public policies?

I do not know if anybody could seriously doubt that after listening to the questioning you have undergone in the last 3 days of hearings.

Now, Mr. Chairman, if any member of this body wants to vote against Mr. Reynolds because they share a different vision of civil rights than he and his President, that is, of course, constitutional right as a member of the committee and as a Member of the Senate. No apologies, it seems to me, are necessary in such a case either by you or by the members of this committee.

The direction this country is going to take in civil rights policy will largely determine what kind of society the United States of America is about to become or is going to become—a society of equal opportunity and treatment for all individuals or a society where the benefits and privileges are apportioned on the basis of minute calculations based upon skin color or nationality or religion or even sex.

You have fought against the latter view and I, for one, applaud you for doing so because you have called the shots the way you have seen them. What attorney here has not been criticized in his analysis of any given case having any amount of controversy? And you are handling the cases that are the most controversial in our country at this time.

I remember that when President Carter was President, we put through this committee something close to 300 Federal judges. Now, I differed widely in ideology and philosophy from many of those people we put through, but we were unwilling to malign those people or to overly criticize their ideological makeup or their particular philosophy unless we had more than I think has been brought out against you here.

And I do not think the fact that your own personal beliefs may differ from another person's should be the sole reason for rejecting a Presidential nominee. To attempt, it seems to me, to tarnish a good and decent man's reputation on the basis of what I consider to be pretty flimsy and skimpy evidence does no service to this institution.

If a man with your record and your history here can be painted with the brush of ethical impropriety, then I do not think there is any man who can pass that particular test of this particular committee, at least when his political views are in controversy, because we widely differ on our committee and sometimes it is pretty irritating among various members of the committee.

Why, I have even been known to irritate people from time to time on this committee.

Before we finally cast a vote on the present nominee, I would respectfully ask my colleagues to stand back a little bit from these hearings and to reflect upon them. I would ask them to reflect upon the scope of your responsibilities and how difficult those responsibilities really are, the intensity of the crucible within which you have had to make these myriad decisions on a daily basis for the last 5 years.

The nature of the allegations made against you really appalls me. I would just ask my colleagues, are we really ready to impune the integrity of this individual on the basis of the evidence that we have had thus far? I do not see that as just.

Who among us would wish to be judged unsuitable for public office on the basis of evidence brought to bear thus far in this particular matter?

My feeling is that, Mr. Reynolds, even though members of the committee differ with you philosphically from time to time, and some differ with you widely, I do not think that that is enough when you have the reputation that you have and when you have the abilities that you have.

I just wanted to make these comments because I really do not have any questions for you. I may have some questions later at the end of this hearing, but right now I do not have any major questions.

I just want to personally tell you that I do not envy you sitting through this period and I do not envy you for having to sit there and answer meticulous questions like this day in and day out. And certainly you have been willing to do it and I think you have held your head high in doing it.

Who is next for questioning? Is it Senator Heflin?

Senator Heflin.

Senator HEFLIN. Mr. Reynolds, I would like to ask you something about the *City of Birmingham* case. There was a consent decree on August 21, 1981, which was during your tenure as the Assistant Attorney General of the Civil Rights Division, pertaining to alleged discrimination on race and gender in practices in Birmingham.

The Lawyers Committee Under Civil Rights as well as the city of Birmingham's attorneys and others have said that the Department of Justice under your direction helped negotiate and helped draft the consent decree and participated in the fairness hearing and the final approval of the consent decree.

Then it is their contention that prior to the *Memphis Firefighters* case, some 4 months before that, the Department of Justice intervened contrary to the provisions of the consent decree and that under the consent decree the Department of Justice was required and had consented to help defend the consent decree that had been entered in 1981.

These cases that arose 4 months before the *Stotts* decision were reverse-discrimination cases, where plaintiffs filed separate suits; they were then consolidated with the case that had been pending for a while. It is contented that there was an obligation by the Department of Justice to defend that decree, and that the decree called for preferences to be given to blacks—a 50 percent, in effect, quota. And that prior to *Stotts,* the Department of Justice assumed a different position, and intervened on behalf of the reverse discrimination plaintiffs rather than intervening with the defendants as an amicus curiae.

Now, with that as background, let me ask you some questions. Did the Justice Department during your administration and your tenure as Assistant Attorney General participate with the city of Birmingham in negotiating a consent decree, dated August 21, 1981, to remedy alleged discrimination on the basis of race and gender in employment practices in the city of Birmingham, in Jefferson County, AL.

Mr. Reynolds. Senator, that decree was negotiated by the Department. Actually, those negotiations took place just prior to my confirmation as Assistant Attorney General for the Civil Rights Division, but the decree itself was entered by the court immediately after I had been confirmed.

Senator Heflin. Well, did you participate in any way confirming the decree or agreeing to it?

Mr. Reynolds. Well, I was not in the negotiation. The decree had been submitted to the court by the time I became the Assistant Attorney General and I did not disagree with the decree in any way between the time that it was submitted to the court and the time the court entered the decree.

Senator Heflin. Now, under the provisions of the decree, did the Justice Department agree to defend the lawfulness of such remedial measures in the event of a challenge by any other person or party who may seek to challenge such remedial measures through intervention or collateral attack? Do you recall whether or not that was a part of that consent decree?

Mr. Reynolds. I believe it was, Senator.

Senator Heflin. Now, in the paragraph 5 of the consent decree it states;

> In order to correct the effects of any under representation of blacks and women in the city's workforce caused by any alleged prior discriminatory employment practices, the city agrees to adopt as a long-term goal, subject to the availability of qualified applicants, the employment of blacks and women in these job classifications in each department in percentages which approximate their respective percentages in the civilian labor force.

Is that basically a correct statement of what the consent decree contained?

Mr. **Reynolds**. That is what is in paragraph 5 of the decree, yes; Senator.

Senator **Heflin**. All right, sir. Then in the fairness hearing, there were some objections by some of the white firemen and the U.S. Department of Justice filed a response to these objections. Did the response to these objections from the Department of Justice contain this language:

> Almost all of the objections to the decrees concern the prospective affirmative hiring and promotion provisions. However, this type of relief has been approved repeatedly by the Fifth Circuit both in the context of a consent decree with the United States and as an appropriately ordered judicial remedy. Thus, the objections of the Firefighters Association—that the affirmative relief unlawfully discriminates against whites and males and goes beyond what an aggrieved party could obtain through litigation to have been answered by a consistent string of decisions in this circuit.

Was that statement filed by the Department of Justice in response to the objections of those firefighters?

Mr. **Reynolds**. I really do not have in my mind the brief that you have, Senator. If you are reading from a brief and it is a Department of Justice brief, I certainly am prepared to accept your——

Senator **Heflin**. Well, basically, I am just trying to find out what was in it. Would that language be substantially correct?

Mr. **Reynolds**. I have no reason to disagree with your reading of the brief.

Senator **Heflin**. Then, also, in this response of the Department of Justice it says:

> The goals are temporary and do not create a bar to the hiring and advancement of white males. Of course, whites and males will be affected by the operation of the consent decree. However, it is an overstatement to say that they have vested rights in the merit system when aspects of the system have been alleged and with respect to police and fire testing, found to be discriminatory. In any case it is not unreasonable for third parties, interests to be affected by decrees even though the third parties did not cause the discrimination.

Do you have any reason to believe that that is incorrect?

Mr. **Reynolds**. No; I do not, Senator.

Senator **Heflin**. All right, sir. And then in the judge's opinion, memorandum of opinion that he wrote approving the consent decree, he has this language:

> Gray, Morris, and those who joined in their objections assert that the settlements may accord preferential treatment to blacks and women with respect to future vacancies in the city's police and fire departments, a contention that can hardly be disputed.

Do you have any reason to doubt that that is in the memorandum of opinion by the judge?

Mr. **Reynolds**. No; I do not, Senator.

Senator **Heflin**. All right, sir. Then prior to the *Stotts* decision, the Department of Justice intervenes and assumes what appears to be, at least from what is alleged, a different position relative to their duty to defend the consent decree and to their interpretation of what appears to give preferential treatment to blacks and females, as contained in the decree and a position that appears to be different from the position found in the (response) filed by the Department of Justice, to the objections to the consent decree and in the judge's memorandum opinion approving the consent decree.

If you would tell us why prior to *Stotts* was this position assumed? What your explanation?

Mr. REYNOLDS. Senator, the private parties had initiated a lawsuit and Judge Acker—a lawsuit under the decree claiming that there had been discrimination against them with respect to certain of the hiring and promotion activities. I think it was the hiring and promotion activities.

Judge Acker asked, or invited, the Department of Justice to participate in the proceedings because we were parties to the decree. Our initial response to the judge was that we would indeed participate, that we would come in nominally as a plaintiff, but that we did not have all the facts at our disposal and that we would have to determine what the facts were with regard to the alleged discriminatory conduct before we could advise the court as to our views.

We came into the case not at all to attack the decree, but to defend the decree. In paragraph 2, the decree has a provision that—if I could read, it, Senator, that says:

> Nothing herein shall be interpreted as requiring the city to hire unnecessary personnel or to hire, transfer or promote a person who is not qualified or to hire, transfer or promote a less qualified person in preference to a person who is demonstrably better qualified based upon the results of a job-related selection procedure.

We came in, in light of that, to the case to advise the court with regard to the specific allegations of discrimination, whether indeed the hiring and promotion practices had taken place in a way that allowed those who were—I think it was promoted—those who were promoted to go forward, notwithstanding that they were demonstrably less qualified than others waiting in line who were claiming that they should have been promoted.

And that is essentially the position that we have taken in that lawsuit, and our entire focus has been on whether the actual decisions made were ones that did or did not satisfy that requirement in the decree, that the hirings and promotions could not be made in a way that would hire or promote anybody demonstrably less qualified over those that are more qualified.

Senator HEFLIN. Then, that is your position of what the decree says?

Mr. REYNOLDS. That is correct. Judge—Senator.

Senator LEAHY. He will answer to either; do not worry. [Laughter.]

Mr. REYNOLDS. And I believe in a recent hearing we had before Judge Pointer on this, he also indicated that in the event that the evidence would demonstrate that there were those that were promoted who were demonstrably less qualified—promoted over those that were more qualified—that those promotions would be impermissible and that that was a proper interpretation of the decree.

Senator HEFLIN. Well, as I understand it, you have now taken the position that the Birmingham decree contains a quota system, which under your interpretation of the *Stotts* decision, is unlawful, there an inconsistency in your position prior to that the decree alleged for promotion of individuals demonstrably less qualified—which, in effect, would mean that there was not a quota system—and your position after *Stotts* that the decrees allows for quotas and is therefore unlawful?

You now take the position, and have written letters inviting jurisdictions which have centered in to court decrees earlier, to modify those decrees in view of *Stotts*.

Is this an inconsistent position? If it is not inconsistent, would you tell us why it is not inconsistent?

Mr. Reynolds. Senator, the issue with regard to this Birmingham case is one that really relates to the proper interpretation of the decree, and an argument is being made by the city and defendants in this case that the decree is one that does contain quotas and does allow preferential hiring and promotions.

What we did is, we wrote and said that there is an ambiguity in the decree. Our view, as we read it, is because the decree has the paragraph 2, it does not command that interpretation. But if that is indeed your reading of it, given the Supreme Court's decision in *Stotts*, we would suggest that we sit down and seek to modify it because we do not think that that is a proper interpretation of the decree.

And so we wrote the city and we indicated to them, because of this difference in interpretation, that one way that we could resolve this dispute, if they were willing to do it, was to indeed enter into a modification of the decree that would clear up the ambiguity. In our view, we felt that that would have to be cleared up in a way that was consistent with the Supreme Court's decision in *Stotts* and interpretation of title VII.

Senator Heflin. All right, sir.

The Chairman. Senator, your time is up, but take a few more minutes.

Senator Heflin. Well, I just want to ask him one more question and then I would like to submit several things for the record.

One of the charges made by the Lawyers Committee for Civil Rights Under the Law is that you have testified that there were 30 instances involving voting right changes submitted under section 5 in which you and your staff have had a difference of opinion.

And they have said that, in effect, these 30 instances are the ones in which you have overruled your staff's recommendation and precleared the change. I would like to ask you, has there been a reverse of that—where your staff has recommended preclearing a change and you said that it should not be precleared?

Mr. Reynolds. No, Senator, that has not happened. In the normal course, if the staff's decision is to preclear a voting change, it will not come to my desk. The change will be precleared without me having to review it. There are some exceptions very occasionally, but normally the way that the office has operated for some extended period of time, where the staff makes a decision to preclear, we will preclear the change and it will not be something that will come to my attention.

It only comes to my attention in those instances where one or more of the staff have recommended that there be an objection. With regard to those that are referenced in the 30-some instances—and it may be a few more than 30—but in that connection, it has not always been the unanimous recommendation of my staff that there be objection.

There have been some of my staff who have thought that it should be precleared and others thought there would be an objection. So it has not always been unanimous.

Senator HEFLIN. I have received a good deal of mail concerning this *Birmingham* case, and I have received it from both sides. I think there is a letter here from Mr. Fitzpatrick that came today. We would like to ask that it be entered in the record.

We would also like to ask that—a letter from James Alexander, of the law firm of Bradley, Arant, Rose & White, dated June 10, 1985, be entered in the record; a statement by the Birmingham city attorney, James K. Baker, dated June 10, 1985; another letter dated June 12, 1985, from Gregory Hawley of Bradley, Arent, Rose & White—all of those be entered into the record as exhibits.

The CHAIRMAN. Without objection, so ordered.

Are you through, Senator?

Senator HEFLIN. Yes.

[Material follows:]

United States Senate

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WASHINGTON, DC 20510

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ARTHUR B. BRISKMAN, MINORITY CHIEF COUNSEL

June 21, 1985

Honorable Strom Thurmond
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Enclosed are copies of letters which I requested be submitted for the record during the confirmation hearings of William Bradford Reynolds.

In addition, several letters have been sent to my office which were delayed, and I request that they also be included in the record. The letters provide additional information concerning the Consent Decree between the Justice Department and the City of Birmingham. The letters present both sides of the issue and in an attempt to be fair to everyone, I respectfully request their inclusion.

Thank you for your cooperation in this matter and for your fine leadership throughout the confirmation process.

With kindest regards, I am

Sincerely yours,

Howell Heflin
HOWELL HEFLIN

HH:jke
enclosures

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ELLENE WINN

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June 10, 1985

FEDERAL EXPRESS

The Honorable Howell Heflin
Senior Senator from the
State of Alabama
Hart Senate Office Building
Washington, D. C. 20510

Re: The Nomination of William Bradford Reynolds to Associate Attorney General

Dear Senator Heflin:

I am writing on behalf of our client, The City of Birmingham, to address our concerns concerning the nomination of William Bradford Reynolds for the position of Associate Attorney General. While the City's reservations concerning Mr. Reynolds are broader than identified in this letter, the issue which I wish to treat relates to his integrity and, concomitantly, his suitability to accept the public trust.

At the outset, the Consent Decree with the City of Birmingham was entered into in August, 1981, after the present Administration assumed office. Without any doubt, the City's Decree contains race and gender preferences. While I will refrain from debating the utility of goals and timetables in this letter, I am satisfied that, absent goals and timetables in the Birmingham Consent Decree, there would have been no material change in the status of blacks in City employment.

Prior to entry of the Decree at the fairness hearing before Judge Pointer, we discussed the proposed operation of the Decree and all parties, including the Department of Justice, clearly understood that preferences for qualified blacks and women were materially involved. More importantly, Judge Pointer's Opinion approving the Birmingham Decree expressly commented upon the race and gender preferences, and he concluded that these preferences were lawful.

In the reverse discrimination cases, the Justice Department subsequently took the position that there were no preferences in the Decree except, where the qualifications of competing black and white candidates were equal, the City would be entitled to select the equally qualified black (or female) in the event its goals had not been met (i.e., race or sex as a "tiebreaker"). That construction of the Decree is disingenuous, and it was never mentioned in the course of negotiations with the City. The Department knew full well what the remedial provisions of the Decree provided, and it sought unsuccessfully to rationalize its current philosophy with the plain language it had drafted.

I note now Mr. Reynolds has taken the position, contrary to the tie-breaker theory, that the Birmingham Decree contains a "quota system" which is "no longer lawful under the Supreme Court ruling" (presumably Stotts). Letter of William Bradford Reynolds to the New York Times, published on June 4, 1985. I can only conclude that the Department interprets the Decree as its convenience, as opposed to its conscience, dictates.

As the enclosed statement of Jim Baker, Birmingham City Attorney, makes clear the Department of Justice never took any of the informal avenues, provided in the Decree itself to resolve differences between it and the City concerning the Decree. The Department elected never to address the issue with us until it has taken a position contrary to its commitment to the City. Moreover, we have reason to believe that they routinely consulted with lawyers attacking the Decree.

Additionally, the Department resisted filing complaints in the reverse discrimination cases even after it had announced its intention (contrary to its Consent Decree obligations) to align with the plaintiffs in the collateral attacks on the Decree. The Stotts decision was, of course, welcomed by the Department of Justice and, as misconstrued by the Department, it provides apparent justification for the position which the Department had been vigorously pursing since 1983.

I believe that the Department of Justice's behavior referable to the City of Birmingham is an exemplar in misconduct. Birmingham's promotional system is infected with uncertainty and it has incurred huge legal fees defending its Decree compliance from the Department's attack. The Civil Rights Division has been duplicitous and it does not foster confidence in the Government of the United States.

On behalf of the City, I would urge you to reject the nomination of William Bradford Reynolds for Associate Attorney General.

Respectfully submitted,

James P. Alexander

James P. Alexander

JPA/sbm
Enclosure

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June 10, 1985

STATEMENT OF BIRMINGHAM CITY ATTORNEY JAMES K. BAKER IN RE: BIRMINGHAM REVERSE DISCRIMINATION LITIGATION

I am James K. Baker and I have served as Birmingham's City Attorney since 1978. I have been responsible for the litigation between the City and the Department of Justice and I am directly familiar with actions by the Department of Justice in their lawsuit against the City, the settlement of that lawsuit, and the "reverse discrimination" cases now pending.

Mr. Reynolds' "Response" to the Lawyer's Committee testimony suggests, with respect to the City of Birmingham, that the Department of Justice simply responded to a judicial intervention invitation, carefully investigated the underlying facts, and, thereafter, determined to exercise its prosecutrial discretion to protect the right of purportedly disenfranchised white males. That impression of the Department's role is inaccurate and must be corrected.

The Birmingham Consent Decree was entered in August, 1981, and it was designed to remedy long-standing employment discrimination in the City of Birmingham.[1] The Department of Justice is a party to that Decree and played the principal role in the negotiation of its terms. The Birmingham Consent Decree provides, inter alia, that the parties to it defend it from attack (Para. 3, Birmingham Consent Decree) and further provides that any party seeking to enforce the Decree shall give notice to the City and a thirty-day "grace" period is provided to seek informal resolution prior to judicial resolution. (Para. 4, Birmingham Consent Decree)

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[1] The facts underlying the employment discrimination in Birmingham (where more than 50% of the population is black) were egregious. In 1981 when the Decree was approved 13% of the City's Police Department was black and 2.1% of the Fire Department was black. See testimony of W. Gordon Graham at pp. 4 and 5.

The Department of Justice began its public campaign against the remedial provisions of the Birmingham Consent Decree in September, 1983. At that time Raymond Fitzpatrick, attorney for the employee union representing Firefighters, presented to attorneys for the Department of Justice, affidavits of middle management white fire officials challenging the qualifications of a black fire lieutenant, Tony Jackson, for promotion to captain. Incidentally, these affidavits were presented to the Department well before they were served upon the City in support of an application for a temporary restraining order to block the Jackson promotion. On the basis of the information presented to the Department of Justice, an attorney for the government announced after the trial judge denied the application for a T.R.O., that the government did not oppose the T.R.O.

This conduct is significant because the government had failed, under Paragraph 4 of the Decree, to advise the City that it believed its actions were contrary to the Decree, did not share the information provided to it by the Firefighters with the City, and took, quite clearly, an adversarial position with respect to the City as to matters it was obligated by the Consent Decree to defend jointly. Significantly, this position was taken well prior to the decision of the Supreme Court in Firefighters Local Union No. 1784 v. Stotts, ___ U.S. ___, 104 S.Ct. 2576 (1984) well before any invitation to intervene by the district court. Mr. Reynolds' subordinate Division attorneys took steps which had the practical effect of undermining the Consent Decree which the Department negotiated and which it was contractually obligated to defend.

Mr. Reynolds' Response glibly implies that the Division's appearance in the Birmingham Reverse Discrimination Cases was in response to a judicial invitation to intervene. However, Mr. Reynolds fails to report that, while the district judge then assigned to two of the reverse discrimination cases, did invite intervention, the judge did not suggest that such intervention be on the plaintiffs' side. The election to join on the plaintiff's side, in derogation of its Consent Decree obligations, was made, and the government so admits, without any investigation of the merits of the claims of the white plaintiffs.

The Department of Justice further asserts that it subsequently undertook "a thorough investigation of the promotion processes," representing that it would determine the merits of the individual plaintiffs' claims. In point of fact the Department, presumably concerned about being accountable under its obligation to defend the Decree, resisted filing a formal complaint in the reverse discrimination cases until it was ordered to do so by the district court. Meanwhile, the Department continued to take adversarial positions which reflected a decision at the outset that it would oppose the City with respect to this Decree. The assertion that the Department of Justice investigated the Birmingham promotional process on some impartial basis is a transparent sham.

Indeed, even the Department's complaints-in-intervention which were the end product of its through investigation, reflect little other than the government's pro forma pattern and practice pleadings. There is, however, some irony in suggesting that the City engages in a pattern and practice of discriminating against whites who comprise disproportionate majorities in each of the departments where a challenge has been raised.

The government has disingenuously characterized its actions in the Birmingham case. In truth the Birmingham Decree, executed under the present Administration, represents a substantial embarrassment to the Department because its remedial provisions do not comport with its new ideology. It has struggled assidously to interpret the Decree in ways which would emasculate the race-and-gender conscious relief to which it agreed - and advocated. Notwithstanding the politics of the matter, the unvarnished facts compel the conclusion that the Department of Justice has betrayed both the City of Birmingham and the public trust.

It is the City's belief that this betrayal should not be rewarded by the promotion of its principal proponent.

Respectfully submitted,

James K. Baker

City Attorney
Birmingham, Alabama

JKB/sbm

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June 12, 1985

The Honorable Howell Heflin
411 Hart Office Building
United States Senate
Washington, D.C. 20510

Dear Judge:

As Arthur may have told you, I am now representing the City of Birmingham in the Reverse Discrimination litigation which is set before Judge Pointer. I am taking the liberty of sending you the enclosed documents because I think that they will help you and other members of the Judiciary Committee understand the role (or roles) that the Justice Department has played in this litigation. I think that you will find that the actions of the Justice Department raise serious questions about the integrity of the Chief of the Justice Department's Civil Rights Division, William Bradford Reynolds.

I. The Consent Decree with the City of Birmingham

As you know, the controversy concerning the Justice Department's role in this case stems from the fact that the Justice Department was a party to several consolidated cases brought in 1974 against the City of Birmingham and Jefferson County. That lawsuit was brought by black plaintiffs who alleged that the City, among other defendants, had engaged in a pattern and practice of discrimination based on race and sex with respect to recruitment, hiring, assignment, promotion and other terms and conditions of employment. The Consent Decree was submitted on June 8, 1981, by all parties to the lawsuit, and was adopted and signed by the Court on August 21, 1981. The Consent Decree includes affirmative action requirements that govern the City's hiring and promotion procedures.

The most significant aspects of the Consent Decree are paragraphs 2 and 3, which describe the remedial actions that the City may take to increase the number of blacks and women hired or promoted by the City. In addition, paragraph 3 contains a significant stipulation that the parties "agree that they shall individually and jointly defend the lawfulness of such remedial measures in the event of challenge by any other party to this litigation or by any other person or party who may seek to challenge such remedial measures through intervention or collateral attack."

The inclusion of this last sentence requiring the parties to defend the Consent Decree from challenge has required the Justice Department to make incredibly circuitous arguments to justify their intervention in the current lawsuit on behalf of white plaintiffs who allege that the hiring and promotion practices of the City involve a pattern and practice of discrimination against whites. After hearing their arguments for intervention, one would believe that the Justice Department did not understand the import of the Consent Decree. On the contrary, however, other documents indicate that the Justice Department knew very well what the Consent Decree would prescribe.

II. Response of the United States to Objections to the Proposed Consent Decree

Before the adoption of the Consent Decree by Judge Pointer in August of 1981, all parties, including the United States, were given an opportunity to respond to the objections to the Consent Decree that had been filed by non-parties to the lawsuit. In its response, the United States clearly indicated that it was satisfied with the Consent Decree, and that the "prospective affirmative hiring and promotion provisions. . ." were similar to relief that had "been approved repeatedly by the Fifth Circuit both in the context of a Consent Decree with the United States ... and as an appropriately ordered judicial remedy." Response of U.S. at p. 5. Further, at pages 9 and 10, the United States indicated that it understood quite well that "whites and males will be affected by the operation of the Consent Decrees", and that the achievement of the hiring and promotion goals was "subject to the availability of applicants deemed qualified on the basis of job-related selection criteria."

III. Transcript of Hearing on the Proposed Consent Decree

On August 3, 1981, Judge Pointer held a hearing at which all parties, and non-parties who objected to the proposed Consent Decree, appeared in open court. The testimony of Mr. Richard Ritter, who represented the Justice Department at that hearing, begins on page 39. He stated repeatedly in his testimony the Justice Department's belief that the hiring and promotion goals were lawful and that they did not "unlawfully discriminate against whites." Tr. at p. 40. At page 48, he indicated the Justice Department's view that "the kind of race-sensitive relief contained in these two Consent Decrees, which does not totally foreclose the opportunity for white males to obtain hiring and promotion within the City, is the more appropriate way to go, and we think it is lawful and constitutional." Tr. at p. 48.

Further, at page 63, Jim Alexander, who represents the City in this action, explained that in certain situations the City would choose to hire or promote blacks who were less qualified than whites as long as the blacks "were perceived minimally qualified" and as long as the City needed to hire more blacks to meet the goals contained in the Consent Decree. Tr. at p. 63. No one at the hearing disagreed with that interpretation of the Consent Decree at that time. No one disagreed with that interpretation at that time because that interpretation is clearly contemplated in paragraph 2 and paragraph 3 of the Decree. The Justice Department's current protestations to the contrary are disingenuous, at best.

IV. Memorandum of Opinion Adopting the Consent Decree

On August 18, 1981, Judge Pointer issued an opinion which adopted the Consent Decree. It is clear from his opinion that the Court, and all parties to the litigation, understood the provisions of the Consent Decree that they were signing.

For example, on page 3, Judge Pointer pointed out that the non-parties who had objected to the Consent Decree had objected because they believed that the Decree accorded "preferential treatment to blacks and women with respect to future vacancies in the City's Police and Fire Departments. Tr. at p. 3 The Judge added that their allegation was "a contention that can hardly be disputed". Opinion at page 3. (Emphasis added.) Finally, at page 10, the Court stated that the settlement was fair, adequate and reasonable and "not inequitable, unconstitutional, or otherwise against public policy." Opinion at pages 10 and 11. Consequently, the Court overruled the objections that had been posed by the Firefighters Association, among others, who had argued that the Consent Decree unfairly discriminated against whites.

One must wonder, given the United States' current position in this litigation, why it did not intervene on behalf of the Firefighters who objected to the Consent Decree before the Consent Decree was signed?

V. Temporary Restraining Order Hearing

On September 14, 1983, there was a hearing before Judge Pointer regarding the application for a temporary restraining order to prevent the City from promoting Mr. Tony Jackson to the position of Captain within the Fire Department of the City of Birmingham. I have enclosed a selected portion of that hearing, wherein Judge Pointer denied the TRO. It was on that occasion that the City of Birmingham first became aware of the Justice Department's decision to abandon the dictates of the Consent Decree.

At the end of the hearing in which Judge Pointer denied the Application for a Temporary Restraining Order, Mr. Richard Ritter, of the Justice Department, stated that the United States was "not prepared to support the City's decision to promote Mr. Jackson at this particular time." Tr. at p. 2.

VI. Correspondence Between Jim Alexander and William Bradford Reynolds

This correspondence, which I believe became a part of the Judiciary Committee's record for the hearing of last week, illustrates very well the City's feeling, and the facts giving rise to the City's feeling,that the U. S. Justice Department has betrayed its commitment to uphold the letter and spirit of the Consent Decree.

VII. Hearing on Motion for Contempt

Judge Pointer declined to hold the United States in contempt of Court for failing to uphold the Consent Decree, but he did indicate very clearly his disagreement with the Justice Department over its contention that the Consent Decree allowed only race-conscious decisions to be made in a "tie-breaker situation". Tr. at p. 22-23. The United States had argued that the Consent Decree would allow for race-conscious decisions to be made only when two candidates, black and white, were equally well qualified, according to all of the relevant criteria for qualification. As you can see, Judge Pointer rejected that view out of hand.

VIII. Summary Judgment Hearing Transcript

On February 19, 1985, the Court held a hearing to rule on motions for partial summary judgment filed by the defendants. The first three pages of this opinion gave a good summary of the entire course of the litigation. In addition, the first paragraph of page 3 indicates the Court's view that the current litigation arose because "the Consent Decrees might not bar all claims of reverse discrimination since they [the private plaintiffs in the current litigation] had not been parties to the prior suits." Tr. at p. 3 (Emphasis added.)

I hardly need to point out that the Justice Department was a party to the prior suit.

On page 14, the Court indicates its skepticism of the United States' current position in this litigation when it stated that

> "the United States has advanced arguments that appear to be contrary to its obligations under the Decree and inconsistent with positions it pressed so vigorously in the earlier litigation. It seems to be contending that the promotion of a minority candidate with lower test scores would never be required by the Decree and would constitute a prima facie case of impermissible reverse discrimination and, indeed, that the City would have a duty to seek such information before considering appointment of a minority candidate. Such a position could hardly be consonant with its obligations to uphold the Decree, which clearly contemplated that a portion of new appointments would go to minority candidates lower on the eligibility registers. Its apparent change in position is particularly questionable in view of the fact that it has contended -- and documented with extensive evidence in the earlier litigation -- that the tests have discriminatory impact against

> minority candidates and are not sufficiently job-related to be valid ranking devices under 42 U.S.C. § 2000e-2(h). Although permitting the United States to align itself with the plaintiffs, the Court will insist that the United States act in accord with its obligations under the Decree." Tr. at pp. 14-15 (Emphasis added).

I think that the enclosed information documents persuasively that the Justice Department has significantly changed its position with respect to this Consent Decree. This, alone, is important. Particularly significant is that the Consent Decree itself required all parties to defend the Decree against all challenges by non-parties. This heightens the City's sense of betrayal.

Quite clearly from the tone of the last several paragraphs of Judge Pointer's Order Denying Summary Judgment in February, 1985, the City is not alone in its sense of betrayal. The Judge has been less than subtle in hinting at his astonishment at the Justice Department's change in positions during the course of this litigation.

On behalf of the City of Birmingham, I strongly urge you to oppose the nomination of William Bradford Reynolds, not only because his betrayal in the course of this litigation indicates an incredible insensitivity to civil rights issues, but because he seems to lack integrity and seems to be devoid of any sense of the proper administration of justice.

Thanking you for your consideration in this matter, I remain,

Very truly yours,

Gregory H. Hawley

Gregory H. Hawley

Enclosures

cc: Jim Baker

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1985 JUN 1[illegible] AM 9 42

June 17, 1985

BY FEDERAL EXPRESS

The Honorable Strom Thurmond
Chairman, Senate Committee for the Judiciary
United States Senate
Washington, D.C. 20510

Re: Confirmation of William Bradford Reynolds - Birmingham Reverse Discrimination Employment Litigation

Dear Mr. Chairman:

This firm represents the Personnel Board of Jefferson County, Alabama, one of the two principal defendants in the above-referenced case. Concurrently with the City of Birmingham, the Personnel Board entered into a separate consent decree with the United States. The Personnel Board's decree provides for race conscious employment decisions. All parties acknowledge that the Personnel Board has fully honored all of its obligations under its decree. The Personnel Board will continue to honor all of its obligations under its decree.

On occasion certain parties have accused both the City and the Personnel Board of being overly zealous in implementing their decrees. The Personnel Board contends that all of its actions have been in accord with its decree. After participating in extensive discovery in this litigation, the Department of Justice has taken the position that some of the City's employment decisions have exceeded the letter and mandate of the City's decree. The Department of Justice does not take that position with respect to the Personnel Board.

This litigation has been hotly contested. Relations between both litigants and counsel have been strained. Both the City and certain defendant-intervenors filed a motion for contempt against the United States. This motion for contempt was summarily denied. It has now been asserted by certain parties that Mr. William Bradford Reynolds and the Civil

Rights Division of the Department of Justice have acted improperly in this litigation. Like the motion for contempt, this assertion is unfounded and incorrect.

While the Personnel Board does not agree with all of the positions taken in this litigation by the Civil Rights Division, none of the Division's positions have been improper or in contravention of either consent decree. As the Personnel Board understands the Civil Rights Division's position, the Division does not contest the validity of either consent decree. Rather the Division contests the City's implementation of its decree. The Civil Rights Division contends that some of the City's employment decisions that favor blacks over whites have gone beyond the letter and mandate of the City's consent decree. For example, both the Chief of Police and an immediate supervisor placed a black police officer under investigation because he was suspected of dealing in hard drugs. Some two months later, while the investigation was ongoing, the City's affirmation action officer ordered the promotion of this black police officer to the position of sergeant. Within two months of his promotion, as a result of the City's own investigation, the recently promoted sergeant was discharged. From the evidence developed so far, it appears that this promotion was made solely on account of race, without any consideration of qualifications. The Civil Rights Division is challenging the City's position that the City has the right to make promotions solely on account of race. It is not challenging the City's decree.

In this litigation in Birmingham, all of the actions of William Bradford Reynolds and the Civil Rights Division of the Department of Justice have been fully in accord with all of their contractual, ethical, legal, and constitutional obligations.

We ask that our views be made known to members of the Senate Committee for the Judiciary and incorporated in the record. Thank you for your consideration.

Very truly yours,

David P Whiteside Jr

David P. Whiteside, Jr.
Michael L. Hall
Attorneys for the Defendant Personnel
Board of Jefferson County, Alabama

MLH/dgw
cc: Honorable Howell Heflin (by Federal Express)
Honorable Jeremiah Denton (by Federal Express)

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1985 J[illegible]

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The Honorable Howell Heflin
411 Hart Office Building
United States Senate
Washington, D.C. 20510

Dear Judge:

I have recently had an opportunity to look at the transcript of William Bradford Reynolds' testimony before the Senate Judiciary Committee on June 4, 1985, and I write this letter to make several comments about the involvement of the Justice Department in the City of Birmingham Reverse Discrimination Litigation. As noted in my letter of June 12, 1985, the Justice Department's actions are inconsistent with the Consent Decree in that litigation. It also seems, however, that they are inconsistent with Reynolds' testimony before the Judiciary Committee.

First, Reynolds states that "[t]hese consent decrees were in effect when I came into office." Hearing before the Senate Judiciary Committee, Tr. at p. 175 (June 4, 1985). This may be true (I do not know when Reynolds took office), but it is misleading. The Consent Decree in this action was submitted on June 8, 1981, by all parties to the lawsuit, and was adopted and signed by the Court on August 21, 1981. Nothing could be clearer than that this Consent Decree was adopted by the Court approximately seven months after the current administration took office.

Second, Reynolds states, at page 175 of the transcript, that the Justice Department's change in position vis-a-vis the Consent Decree occurred only after the Memphis Firefighters decision was handed down by the Supreme Court. Reynolds states: "But we very definitely did not go in ... any of these consent decrees and seek to dismantle them until we were able to proceed on the basis of a change of law as we understood it as a result of the Memphis Firefighters' case." Tr. at p. 175. This is not true. As I indicated to you in my letter of June 12, 1985, the City of Birmingham first became aware of the Justice Department's decision to abandon the dictates of the Consent Decree when, on September 14, 1983, there was a hearing before Judge Pointer regarding the application for a temporary restraining order to prevent the City from promoting Mr. Tony Jackson to the position of captain within the Fire Department of the City of Birmingham. On that occasion, Mr. Richard Ritter of the Justice Department, stated that the United States was "not prepared to support the City's decision to promote Mr. Jackson at this particular time." TRO Transcript at p. 2.

Moreover, the Justice Department advised Judge Acker, by letter dated February 10, 1984, that "the United States will move to intervene on behalf of plaintiffs" in Wilks v. Arrington, an action challenging the promotion of blacks in the Fire Department, and Zannis v. Arrington, an action challenging the promotion of blacks in the Police Department. On March 6, 1984, Judge Acker issued an order authorizing the Justice Department to intervene in those cases on behalf of all plaintiffs. While the United States assiduously avoided filing formal "complaints in intervention" until this year, it is clear that the Justice Department's decision to abandon the Consent Decree in this action came long before the Supreme Court's decision in Firefighters Local Union #1784 v. Stotts, which was decided on June 12, 1984.

Third, Mr. Reynolds clearly states, at p. 87, that the Eleventh Circuit's interpretation of Stotts, in Turner v. Orr, No. 84-3266 (11th Cir. April 18, 1985), is at variance with his own reading of Stotts. Further, at p. 88, he states that "we have no plans to commence additional lawsuits at the district court level in order to achieve further modification of existing quota provisions in court orders or consent decrees until after the appellate court decisions have been reviewed and become final, or the Supreme Court has had an opportunity to give more clarification in this area". Tr. at p. 88. This testimony is astonishing when one realizes that the Department of Justice filed two complaints in intervention, in Zannis v. Arrington and Birmingham Association of City Employees v. Arrington, on May 16, 1985 -- one month after the Eleventh Circuit's decision in Turner v. Orr.

This testimony raises a very important question: How does Mr. Reynolds justify the Justice Department's filing complaints in intervention in the consolidated reverse discrimination cases against the City of Birmingham when: (a) such action violates paragraph 3 of the Consent Decree which requires that all parties defend the Consent Decree against collateral attack; (b) such action is at variance with the Eleventh Circuit's interpretation of Stotts; (c) such actions are directly contradicted by his commitment not to "commence additional lawsuits at the district court level in order to achieve further modification of existing quota provisions and court orders or consent decrees...". Tr. at p. 88.

I would appreciate it if you would consider these matters before Mr. Reynolds reappears before the Judiciary Committee on June 18, 1985. I think that the transcript of the Judiciary Committee meeting of June 4, 1985, like the actions taken by the Justice Department in the City of Birmingham Reverse Discrimination Litigation, raises very serious questions about Mr. Reynolds' integrity and about his ability to administer the laws of the United States.

I appreciate your consideration of this matter.

Very truly yours,

Gregory H. Hawley

GHH/lh

cc: Jim Baker, City Attorney

The Chairman. The distinguished Senator from Pennsylvania.

Since Senator Hatch did not use all of his time, he is giving it to you.

Senator Specter. Thank you very much, Mr. Chairman.

How much time do I have then?

The Chairman. Well, you have 9 minutes more. Nine and 15 make 24

Senator Specter. Thank you very much, Mr. Chairman.

Senator Simon. Mr. Chairman, just two questions.

Some of us have not had our first round yet. Senator Specter is on his second round. I am not sure what the rules of the committee are.

Senator Hatch. Would you mind if I defer my remaining 9 minutes to him? I would like to hear Senator Specter's questioning of Mr. Reynolds. He had followed a line of questions he was not able to complete.

Senator Simon. I am not opposed to that at all, I am not opposed to Senator Specter getting his second round. But some of us have not had our first round yet. And I just want to know——

The Chairman. You are right. If you have not had your first round, you are entitled to it.

Now, do you want to yield to them now or not?

Senator Hatch. Well, can I yield my 9 minutes to him then?

Senator Simon. He can yield his 9 minutes and then I would like to have my 15.

The Chairman. You have 9 minutes, Senator Specter. And then we will yield to him and come back to you if you are not through.

Senator Leahy. Then, at some point, do I get my first round too, Mr. Chairman? I just want to make sure how this routine works.

The Chairman. Well, you are late. You do not get any. [Laughter.]

We will reach you in due time.

Senator Leahy. I will try to be around for the vote, Mr. Chairman. [Laughter.]

The Chairman. That is what I am afraid of. [Laughter.]

Senator Specter, you may proceed.

Senator Specter. Thank you, Mr. Chairman.

Mr. Reynolds and I had a brief conversation over the luncheon recess when he asked to chat very briefly. And as a result of that conversation, I think it would be appropriate to begin with a followup comment from Mr. Reynolds on some of the questions which I had asked him earlier this morning about his testimony on March 1, 1982, concerning the Voting Rights Act.

I would be pleased to give you this opportunity now, Mr. Reynolds, for you to answer.

Mr. Reynolds. Thank you, Senator.

I just wanted to say that, in the colloquy we had earlier, I had not had reference to the 1982 transcript and had not had an opportunity to review it. And based on the conversation we had, I had indicated to you that it did seem to me that, as you recounted it, there might have been room for some misunderstanding of what I was trying to convey.

I have gone back and reviewed that, and I do feel that I tried to be as candid and forthright with the committee as I could in that regard. And certainly I had no intention of misleading you or anybody else on the committee.

You had asked about whether I could comment on the case, and I had indicated to you that it would be inappropriate for me to express my personal views as to whether the evidence in the pending case does or—as to what it does or does not make. And you had indicated, Senator, that you were not asking for my personal views, but you were asking for my legal judgment as an attorney. And I indicated that I thought that if I appeared in the case and had a brief on file that I could have spoken to the legal judgment, but then in view of the fact that we had not done that and the case was pending, it would be inappropriate for me to speak to the matter.

I did tell you that in terms of my legal judgment, I said I think I have given my judgment. My judgment is that the at-large system and underrepresentation alone in Burke County are not, in my judgment, sufficient to show a violation of the Voting Rights Act under section 2 as it is now enacted. Then you went on and asked if I was familiar with the record, and I indicated I was. You asked me in light of the record and in conjunction with the other factors that you had summarized in the fifth circuit opinion whether it is not sufficient to provide a basis for me to say whether or not it is a violation of the act. And I had indicated that I have a personal view on that, but it would be inappropriate with the case pending for me to make a statement as to what my personal judgment is on the facts of that case.

Senator SPECTER. Are you referring to page 1684 of the record?

Mr. REYNOLDS. 1684 through 1686 of the record of the 1982——

Senator SPECTER. 1684 to 1686.

Mr. REYNOLDS [continuing]. Hearing.

And all I—if that did indeed leave you with an impression other than the one that I was intending, I certainly did not mean to mislead you in any way, Senator. My point was that I did not think it was appropriate for me to offer my personal views, which are the views that were set forth in the internal memo that we have referred to; that I could not speak to that with the case pending; that that would not be a proper frame of reference. And I indicated that I thought that without dealing with the specific case, that if you were just to look at underrepresentation in the at-large system, that would not be a violation of the statute.

Senator SPECTER. Well, Mr. Reynolds, as I said to you during the luncheon recess, I was troubled with your testimony at that time. And I could have seen, if you had said to me you would not discuss it at all. But when you made the responses about workload and about the facts of this kind of a case, I had no reason to believe that you thought this was other than a violation of the Voting Rights Act.

And as I have said, when you deal with a matter of a Senate committee considering a change in law, I think we have to have a very open relationship and that it is not an arm's-length relationship which the Department of Justice has with the Senate Judiciary Committee. And the customary considerations which preclude a lawyer who was involved in litigation commenting on a case I thought were not applicable. For one thing, you were not the lawyer in the case. And even if you were, I think there is a paramount concern for a Senate committee considering a change in law. And it is very important for this Senator to know what the key man on the Voting Rights Act, the Assistant Attorney General for the Civil Rights Division, thought.

And I did leave that session under a misinterpretation. I had a different conclusion. And I was very surprised to find a memorandum from you to the Solicitor General, which is why I brought the subject up.

Senator **Hatch**. Would you yield to me for a minute?

Senator **Specter**. Well, I would be glad to yield except not on my time.

Senator **Hatch**. Thank you, sir. I think that was a yield, but I am not sure.

Senator **Specter**. That was a yield.

Senator **Hatch**. Just so I might understand this a little bit better, you explicitly chose not to give your personal views as well as your legal views on this subject because the case was pending?

Mr. **Reynolds**. I declined to do that.

Senator **Hatch**. And you explicitly did so in the three pages that you cite from 1684 to 1686?

Mr. **Reynolds**. That is correct.

Senator **Hatch**. OK.

Senator **Specter**. Senator Hatch, the problem is compounded by the fact that when Senator Leahy was asking questions, Mr. Reynolds said, page 182 of the record, you did not ask for my views. I do not really think we can get involved in what is professional legal judgment or what are views——

Mr. **Reynolds**. That is right.

Senator **Specter**. And I am candid to say that Senator Hatch and I discussed the matter, and we feel that there are other matters where there is not as much openness between the Department and this committee as we really need to have. We are really all on the same team. We are charged with carrying out the public interest. We are not of an adversarial relationship. We are not lawyers on opposite sides of a case.

And when Senator Hatch and I discuss something, if there is some misinterpretation that he may take from my words, I am very careful to reexplain it or see what is going on. And I think when you and I talk, Mr. Reynolds, we have to talk the same way.

Senator **Hatch**. Well, if I could just add something, Mr. Reynolds.

I really believe that is one of the problems we have with the past Justice Department since we have not had always the candor that we have wanted up here, and we have not always had the exceptional working relationship that I hope that as you get into this position you will be able to help provide.

I think Senator Specter has done a signal service to the committee by raising these issues. And frankly I hope that in the future we will have a good relationship and that we will be able to have more forthcoming and more forthright statements made up here to assist us in doing the work that we have got to do.

Senator **Biden**. Is the Senator implying that they were not forthright to date?

Senator Hatch. I am talking about the Justice Department in general.

Senator Biden. Oh.

Senator Hatch. I think members of the Justice Department have been very forthright on these hearings.

Mr. Reynolds. Senator, if I am confirmed, I certainly will endeavor to do everything I can to have that kind of a working relationship, and open relationship with this committee and all members of this committee in the things that we do at the Justice Department.

Senator Hatch. Thank you.

Senator Specter. Mr. Reynolds, let me continue the questioning in a somewhat similar vein and the concern I have really searching for the facts here on the interpretation of the *Stotts* case.

When you and I discussed the *Stotts* case in your earlier appearance on this confirmation hearing you had said that you did not want to pick any fights. And in studying with some care your 56-page response to the document filed by the Lawyers Committee, and their reply to that response, I note your statement with respect to the *Buffalo* case which bears very heavily on the question of whether you are following the stated law of *Stotts*. And you say, at page 31 of your 56-page—Mr. Chairman, this question is going to take some time so if——

The Chairman. You can finish your question and he can finish his answer, and then we will move ahead and then come back. Please finish this question.

Senator Specter. Well, the question does not lend itself to a single question, Mr. Chairman. So I will wait my next round.

The Chairman. The distinguished Senator from Illinois, Mr. Simon.

Senator Simon. Thank you, Mr. Chairman.

Mr. Reynolds, when you appeared here before, I asked a question—which I will read from the transcript now.

"My staff, among other items, has this item, and I would be interested in your comment on it."

And then I quoted from the staff memo,

> With regard to the handicapped, Mr. Reynolds reversed the Justice Department's previous positions that institutionalized retarded people had rights to receive training and to be free from unnecessary confinement. This position has led to the resignation of virtually all of the professional staff lawyers working on such cases in the Civil Rights Division.

End of quote.

I am continuing the questioning then. "Is that latter part of my staff memorandum accurate, that there was this resignation on the part of people working in this area because of the position you have taken?"

And then you responded, "I have no knowledge that this is the case, Senator. I do know that there has been a turnover within the Civil Rights Division."

And then I am skipping a few sentences. "I do not know personally what motivated any lawyer to leave the Department in any section."

And I am skipping one question down here. Then I asked, "I am interested in finding out if people in fact did resign in protest to your determination on the question of institutionalized retarded people and their rights."

You responded, "I know of only one lawyer that I think properly and accurately would fit into that category."

Then I said, "All right, if you could provide any information as to whether there are others."

We then received from you your response, and in that you have this sentence, "Other than Tim Cook, who is, to my knowledge, the only lawyer who resigned in protest from the Special Litigation Section, I am aware of no other Division attorney whose resignation was submitted in protest to Division policy."

And if I can just read two sentences from Tim Cook's letter of resignation. He says, "I resign from this Department of Justice effective today. It has become impossible for me to continue in employment for a Government that refuses to enforce laws duly enacted by its Congress to protect its citizens from discrimination."

And then I am skipping over a couple of pages. "Many like me have left in frustration that Americans subjected to illegal discrimination can no longer find refuge with their Government."

Let me ask you about several other people if I may.

Does the name Leonard Reiser mean anything to you? Perhaps it is pronounced Reiser, R-e-i-s-e-r. He is an attorney.

Mr. **Reynolds**. Yes, I believe he was an attorney with us. I am sorry. I believe he was an attorney with us.

Senator **Simon**. That is correct.

Let me just read. We have an affidavit from him. He said that he obtained an exit interview with William Bradford Reynolds. He says, "I stated that the primary reason for my resignation was my disagreement with his policies concerning enforcement of the rights of institutionalized persons."

Does the name Robert Plotkin mean anything to you?

Mr. **Reynolds**. Yes, it does. He was with the Division and left shortly after I arrived.

Senator **Simon**. He in fact was the Chief of the Special Litigation Division?

Mr. **Reynolds**. That is correct.

Senator **Simon**. And I assume his letter of resignation you were aware of?

Mr. **Reynolds**. I am aware he did resign and there was a letter of resignation.

Senator **Simon**. Let me read one sentence from that letter of resignation. "My decision to leave stems from my fundamental and abiding disagreement with the philosophy and policies of Attorney General Smith and his designated advisors." Making clear that he disagrees with you—particularly in the area of civil rights enforcement.

Does the name David J.W. Vanderhuff mean anything to you?

Mr. **Reynolds**. Yes, it does. He was a former lawyer with the Division.

Senator **Simon**. My note here says he was a senior trial attorney.

In his case you requested his resignation, I believe. It says,

> My resignation as Senior Trial Attorney from the Special Litigation Section was requested by Mr. Reynolds, effective March 1, 1983. My professional, ethical and moral disagreement with civil rights enforcement in litigation policies were well

known to the leadership of the Special Litigation Section and to Mr. Reynolds personally. They formed the basis for and, I believe, were the reasons my resignation was requested.

Does the name Robert Dinerstein mean anything to you?

Mr. **Reynolds**. Yes. He is a lawyer with the Division.

Senator **Simon**. I have the note that the reasons for his resignation include differences with the leadership of the Civil Rights Division, including William Bradford Reynolds, Assistant Attorney General, over the Division's policies and practices with respect to enforcement of the rights of institutionalized persons.

I had an exit interview with Mr. Reynolds. To the best of my recollection, we discussed the fact that my resignation was due in part to my differences with Mr. Reynolds and his assistants over their interpretation of the nature and the scope of the rights of institutionalized disabled persons.

Does the name, and I may be mispronouncing it so you may not recognize it, Ayjoi A. Ayaterel mean anything?

Mr. **Reynolds**. Yes.

Senator **Simon**. And who was she?

Mr. **Reynolds**. She was also a lawyer with the Division.

Senator **Simon**. And she also left the Department, and she says in her affidavit,

I was frustrated with the implementation of the Reagan Administration's policies by William Bradford Reynolds in the concomitant retreat from the civil rights policies and practices of the Carter Administration. I participated in meetings in which my disagreements with these civil rights policies were discussed with Mr. Reynolds. I also signed a petition order to Mr. Reynolds denoting my dissatisfaction with certain of his decisions.

And then she goes on to say that was the reason for her leaving.

It is a total of six people in a relatively small division who resigned. And it appears to be in direct conflict with the testimony that you gave here.

I guess my concern is did you simply not recollect these resignations or what is your explanation for the variance between the testimony that was given by you and these letters which clearly are in conflict?

Mr. **Reynolds**. Well, Senator, there are other attorneys in addition to those who resigned from the Division and, in exit interviews, indicated that they had a disagreement and indeed fundamental disagreement with some of the decisions that were being made in the Division. I did not regard any of them as doing a resignation under protest. They all had other jobs. They were all going to other places from the Division. But they did indeed in the exit interviews express to me that disagreement. And I indicated to them that I thought if there was that difference of opinion, or that there was a philosophical divergence of views of the sort they expressed, then I thought they were doing the thing that probably was the most professional thing to do and to move on to other places and work there.

Senator **Simon**. But what you have just told us now seems to contradict directly what you said earlier. When you testified, you said I know of only one lawyer that I think properly and accurately would fit into that category of resigning because of your policies. And yet we have been able to come up with six, and you say there are additional lawyers who also may have left because of that reason.

Mr. **Reynolds**. Well, Senator, I believe Tim Cook, who I mentioned, did resign under protest and as a protest. I would believe the others resigned in disagreement with the policies. They had other jobs that they were going to. They did not make a major issue of it. They came in and talked to me quietly, and sat down for exit interviews—most of them, not all of them, and I think that to me that was not a protest but was simply that the employees who were there when I came there felt that they had a sufficient disagreement with the policies that they did not want to remain. And I felt that that was a proper and appropriate response for them to make.

Senator **Simon**. But if, as you say, they resigned quietly, but they told you they were resigning because of policy, you do not consider that a resignation in protest over policy?

Mr. **Reynolds**. Well, as I understood your question, it was whether they made it a protest issue, as Tim Cook did, and I certainly did not regard those resignations, or others of my people who were in the Division who decided to resign because they had a disagreement and had jobs and were moving to those jobs, as a protest resignation.

Senator **Biden**. Would the Senator help us out and read the question again? I do not have the transcript in front of me. How was the question originally framed?

Senator **Simon**. It was really asked in two ways.

First, I quoted a memo from my staff that said:

> With regard to the handicapped, Mr. Reynolds reversed the Justice Department's previous position that institutionalized retarded people had rights to receive training and to be free from unnecessary confinement. This position has led to the resignation of virtually all of the professional staff lawyers working on such cases in the Civil Rights Division.

End of quote from that memo.

Then I asked the question, "Is that latter part of my staff memorandum accurate, that there was this resignation on the part of people working in this area because of the position you had taken?"

And Mr. Reynolds replies, "I had no knowledge that this is the case, Senator. I do know that there has been a turnover within the Civil Rights Division."

And then later——

Senator **Biden**. If the Senator would just stop there.

Senator **Simon**. Yes.

Senator **Biden**. Mr. Reynolds, I do not understand how a question framed that way, concerning a staff memo to the Senator from Illinois, which read, "Disposition has led to the resignation of virtually all of the professional staff lawyers working in such cases in the Civil Rights Division."

And then the Senator is asking, "Is the latter part of that memo correct?" and you are saying, "I do not know, I do not know personally what motivated lawyers to leave the Department in any section."

You just testified that you did know, that what motivated them to leave was a disagreement in policy. And you suggested to them if that disagreement in fact existed, they were doing the professional thing.

What did we misunderstand, or what did you misunderstand about the question? I mean it seems clear to me that there is an inconsistency here.

Mr. REYNOLDS. Well, Senator, the question relates to a memorandum I wrote, and whether these resignations were all as a result of that memorandum.

My understanding was that there were disagreements, that there were disagreements for a number of reasons; that the memorandum that they have reference to was not the catalyst or the precipitating factor that caused certainly all the people that you have listed there, that caused their resignation. And I think that it was certainly not the catalyst that was the event that caused the others.

I think that there were disagreements with regard to members in the Division over different things at different times. They made their decisions to leave and they did leave. In an exit interview, some of them did tell me that it was based on a fundamental difference of policy and decisions.

But my recollection is that we did not have a mass resignation as a result of that memo. We had different people who responded to that memo, and we had a lot of other different kinds of decisions that were going on at that time within that section of the Division, and there are some people who had a disagreement with that and that led to their resignations.

Senator SIMON. I think, with all due respect to the witness, he is reframing the question.

The question was not how many people resigned in response to any memorandum. The question was were they resigning in response to the policies.

Let me—and I do not mean to——

Senator BIDEN. No; I just wanted to clarify it myself.

Senator SIMON. Let me take a point from the letter of resignation of Timothy Cook. May I ask this.

Is he correct when he says—this is in his letter to Attorney General William French Smith. He says, "Many like me have left in frustration that Americans subjected to illegal discrimination can no longer find refuge with their government."

Is Mr. Cook correct or is he not correct?

Mr. REYNOLDS. Well, I think that there were a number who left because they had a fundamental disagreement, and it may well be that he is correct as to the frustration point.

Senator SIMON. We have affidavits from five people plus Mr. Cook's resignation. We have resignations from six people basically because of disagreement on policy. You say there were others who disagreed on policy.

Clearly, there is a conflict between that and your testimony last time. But how many others would you guess have resigned because of disagreement with your enforcement on civil rights in your whole approach?

Mr. REYNOLDS. I do not have a number right now. We could certainly supply that to you, Senator.

Senator **Simon**. How many are in that special Division that is called—what is the title—for the representation of the handicapped.

Mr. **Reynolds**. The Special Litigation Section.

Senator **Simon**. The Special Litigation Division.

Mr. **Reynolds**. I think there are 18 at a time. But there have been some turnovers so——

Senator **Simon**. But 18, so you had at least one-third of one portion of your responsibility resign plus others that we do not have, that you recall. That seems to be a pretty major kind of a decision on the part of your employees, key employees. I find it hard to believe that you could not recall in testifying here last time.

Mr. **Reynolds**. Well, as I say, Senator, I thought your question related to the latter part of the staff memorandum where it said this position has led to the resignation of virtually all of the professional staff lawyers working on such cases in the Civil Rights Division.

Your question is that latter part of my staff memorandum accurate?

And what I was responding to is that I did not have knowledge of that, but I do not believe that that memorandum is something that led to the resignation of virtually all of the professional staff lawyers working on such cases. Some of those six that you mentioned were not involved in that particular aspect of the special litigation activity anyway. They were involved in the prison cases rather than in the mental retardation institutional cases.

And then you asked me how many resigned in protest, and I said I believe Tim Cook is the only one certainly that I can recall who did resign in protest.

Senator **Simon**. Well, I guess we have a fundamental disagreement on what it means to resign in protest because—and I really did not say in protest, though you can say it.

The question was is the latter part of my staff memorandum accurate that there was this resignation on the part of people working in this area because of the position you have taken? And clearly we have six people, at least one-third of the force, plus others we do not know about, that you know about, who did resign because of the position you have taken.

Is that correct?

Mr. **Reynolds**. That is correct.

Senator **Simon**. I yield to my colleague from Delaware.

Senator **Biden**. Mr. Reynolds, did you have any doubt about what the Senator from Illinois was driving at when he asked you those questions, or did you think he precisely meant a memorandum, and when he used the word on line 25, page 43, of the transcript, "in protest," that he meant in protest in the sense that someone carries a placard?

I mean, you really did not know what he was driving at; that there are a lot of people who disagree with your policies and left because of that? You do not think a reasonable man could read from that series of questions that that is what he was moving toward?

Mr. **Reynolds**. Senator, I thought when he asked about in protest, he had specific reference to the Tim Cook matter. When we came into office, there were a number of lawyers who were in the administration from the prior administration; they had different views philosophically on certain issues and there were some of them who remained and others who chose to leave because of disagreements.

And it was not my understanding of the Senator's question that he was asking for that kind of a situation. That happens, I think, regularly with turnovers of administration and there are any number of lawyers who, with that turnover, would decide to move on because they had different philosophical views. And my own sense is that that is perfectly appropriate and the proper way for them to behave.

I thought that what the Senator was probing for was whether there was a mass resignation in protest of what I had done or whether there was any particular protest, and my answer was that I knew of the Tim Cook matter, and that was the only one that had come to my mind at that time.

Senator HATCH. Would you yield, Joe?

Senator BIDEN. I yield.

Senator HATCH. Senator Simon, are you referring to this letter that the chairman got that has 10 names on it?

Senator SIMON. I am not.

Senator HATCH. You are not?

Senator SIMON. I am not. I am aware of that letter and I am aware that someone's name apparently was put on there improperly, but I have not used that letter or referred to it or entered it into the record.

Senator HATCH. OK, I noticed that Stephen Berlin's name was on there and he did write a letter clarifying his position. Nobody knows where this letter came from, but it lists these 10 names of people who disagreed with Mr. Reynolds, and then Mr. Berlin sends this letter in. We ought to put both of these letters into the record, for whatever value they have. You might want to read the Berlin letter.

Well, let me read the Berlin letter.

Senator BIDEN. For the record, though, Mr. Chairman, and Senator Hatch, you are the one raising the issue of this letter. No one else is——.

Senator HATCH. There is no question about that.

Senator BIDEN. OK.

Senator HATCH. This is what the letter says on June 13, 1985:

> Dear Senator Thurmond, I was a staff attorney in the Civil Rights Division of the U.S. Department of Justice in 1980 through 1983.
>
> Earlier today, I received an inquiry from Senator Simon's office about whether I should sign a notarized statement that I had resigned my position at the Justice Department in protest of William Bradford Reynolds' policy. The staffer indicated that my name appeared at the head of a list on a petition sent to your office and supposedly signed by numerous former Justice Department attorneys who stated they had resigned in protest to Mr. Reynolds' policies concerning the mentally retarded.
>
> Please know that although certain persons requested that I sign such a petition, I specifically refused to sign the petition. I have never seen a draft of this petition and I have never signed it or authorized that anyone else sign it for me. My decision to resign from the Justice Department was not related to Mr. Reynolds' policies concerning the rights of the mentally retarded. I request that my name be removed from the petition.

I would be most grateful if you would also let your fellow committee members know of this letter.

The only reason I put that in is because I had seen the letter with 10 names on it and you have indicated there may have been a few others who happened to disagree with the President and your policies at the Justice Department.

Senator SIMON. Mr. Chairman.

Senator HATCH. It is not unusual to have people who disagreed with you; we have had some here.

Senator SIMON. Mr. Chairman.

Senator HATCH. Could I put both of those in the record, for whatever value they have?

The CHAIRMAN. I think we had better put both in the record.

[Letters follow:]

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1315 Walnut Street
Room 1632
Philadelphia, Pa. 19107

June 6, 1985

Hon. Strom Thurmond
Chairman
Senate Committee on the Judiciary
224 Senate Dirkson Office Building
Washington, D.C. 20510

Dear Senator Thurmond:

It has been brought to our attention that, in testimony before the Judiciary Committee on June 5, 1985, in response to a question from Senator Simon, Mr. Wm. Bradford Reynolds stated that he knew of only one attorney who had worked for the Special Litigation Section of the Civil Rights Division whose decision to resign stemmed from opposition to Mr. Reynolds' policies.

We write to inform the Committee, for the record, that we all are attorneys who were employed at the Special Litigation Section under Mr. Reynolds' leadership. One of our responsibilities was to enforce the rights of institutionalized persons, including mentally disabled people. All of us vigorously opposed Mr. Reynolds' narrow views of the rights of institutionalized persons and resigned in part due to that opposition.

Respectfully submitted,

Steven Berlin
Terisa E. Chaw
Timothy M. Cook
Robert Dinerstein
James Hendrickson
Yolanda Orozco
Robert Plotkin
Leonard Rieser
David Vanderhoof
Stephen Whinston

NOTE → cc : Senator Joseph Biden
Senator Paul Simon

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June 13, 1985

VIA FEDERAL EXPRESS

The Honorable Strom Thurmond
United States Senate
Washington, DC 20510

Dear Senator Thurmond:

I was a staff attorney in the Civil Rights Division of the United States Department of Justice from 1980 through 1983. Earlier today I received an inquiry from Senator Simon's office about whether I would sign a notarized statement that I had resigned my position at the Justice Department in protest of Wm. Bradford Reynolds' policies. The staffer indicated that my name appeared at the head of a list on a petition sent to your office and supposedly signed by numerous former Justice Department attorneys who stated they had resigned in protest of Mr. Reynolds' policies concerning the mentally retarded.

Please know that although certain persons requested that I sign such a petition, I specifically refused to sign the petition. I have never seen a draft of this petition, and I have never signed it or authorized that anyone else sign it for me. My decision to resign from the Justice Department was not related to Mr. Reynolds' policies concerning the rights of the mentally retarded.

I request that my name be removed from the petition. I would be most grateful if you would also let your fellow Committee members know of this letter.

Very truly yours,

STEVEN B. BERLIN

SBB/pmd
cc: The Honorable Wm. Bradford Reynolds
The Honorable Paul Simon

The CHAIRMAN. Both letters were addressed to me. One is dated June 6, 1985. It is written from 1315 Walnut Street, room 1632, Philadelphia, PA 19107. Incidentally, we find that that is from a public interest law center, signed by 10 people, headed by Steve Berlin.

The letter that the distinguished Senator from Utah just read was from the first name on the list, Stephen Berlin, who indicated that he did not sign the letter and knew nothing about it. So we will just put them both in the record.

Senator SIMON. Mr. Chairman.

The CHAIRMAN. The distinguished Senator from Illinois.

Senator SIMON. I would also like to ask that the various affidavits that I have referred to be put in the record in toto, as well as the letter of resignation of Timothy Cook.

I would also make one request of the witness or someone from the Justice Department that they check out to see if in any previous period in the Civil Rights Division of the Department of Justice there has been any comparable number of resignations for any reason whatsoever, if there has been a similar turnover.

I thank you, Mr. Chairman.

The CHAIRMAN. Without objection, they will be placed in the record.

[Material follows:]

AFFIDAVIT

I, Leonard Rieser, state under oath as follows:

1. I was employed as an attorney in the Special Litigation Section of the Civil Rights Division, United States Department of Justice, from September, 1976, until my voluntary resignation in September, 1982. I specialized primarily in the area of the rights of institutionalized mentally retarded and mentally ill persons.

2. Shortly before leaving the Justice Department, I requested and obtained an exit interview with William Bradford Reynolds, Assistant Attorney General for Civil Rights.

3. During my interview with Mr. Reynolds, I stated that the primary reason for my resignation was my disagreement with his policies concerning enforcement of the rights of institutionalized persons. I indicated, in substance, that in my view the Division was failing to enforce many of the basic legal rights of people confined in mental hospitals and retardation facilities, and that I had decided to leave the Division for this reason.

Leonard Rieser

Subscribed and sworn to
before me this 14th day of
June, 1985:

Bessie Dougherty
Notary Public

BESSIE DOUGHERTY
Notary Public, Philadelphia, Phila. Co., Pa.
My Commission Expires May 31, [illegible]

U.S. Department of Justice

Washington, D.C. 20530

JUL 2 1981

Honorable James P. Turner
Acting Assistant Attorney General
Civil Rights Division
U.S. Department of Justice
Washington, D.C. 20530

Dear Jim:

This letter is to advise you that I intend to resign from the Department of Justice, as of August 15, 1981. Because I will be on previously scheduled annual leave immediately prior to that time, the practical date of my resignation will be July 31, 1981.

My brief tenure in the Civil Rights Division has been one of the most stimulating and exciting periods in my professional career. I have benefited enormously from the wisdom of my colleagues in the Division, and I especially value and respect my staff in the Special Litigation Section. To them I owe a special thanks. I will miss them all.

My decision to leave stems from my fundamental and abiding disagreement with the philosophy and policies of Attorney General Smith and his designated advisors. An Attorney General is entitled to have in responsible positions persons who will fruitfully execute his orders. I am not in conscience able to do so, and my resignation is, therefore, both necessary and proper.

In closing, I would like to extend my personal regards to you, to Lynn Walker and to Brian Landsberg, for providing guidance to me--and to the Division--during a troubled and uncertain period.

Sincerely,

Robert Plotkin

cc: Lynn Walker
Brian Landsberg
E. Hugh Kinney
Section Chiefs

Declaration Under Penalty of Perjury

Adjoa A. Aiyetoro, pursuant to 28 U.S.C. §1746, hereby makes the following declarations:

1. I am an attorney licensed to practice law in the State of Missouri.

2. On November 6, 1978 I commenced employment with the United States Department of Justice, Civil Rigjts Division, Special Litigation Section.

3. I left the Department of Justice in January 1982.

4. While working at the Department of Justice, I became disillusioned with the Reagan Administration's civil rights policies.

5. I was frustrated with the implementation of the Reagan Administration's policies by Wm. Bradford Reynolds and the concomitant retreat from the civil rights policies and practices of the Carter Administration.

6. I participated in meetings in which my disagreements with these civil rights policies were discussed with Mr. Reynolds. I also signed a petition/letter to Mr. Reynolds denoting my dissatisfaction with certain of his decisions.

7. I left the Department of Justice in January 1982 as a result of these frustrations in addition to a need to utilize my professional skills in other ways.

I declare under pain of perjury that the foregoing is true and correct.

Executed on June 15, 1985

City of Washington)
ss.
District of Columbia)

AFFIDAVIT OF ROBERT DINERSTEIN

BEFORE ME, the undersigned authority, personally appeared Robert D. Dinerstein, who, after having been first duly sworn, upon his oath, deposes and states as follows:

1. My name is Robert D. Dinerstein. I am Clinical Lecturer and Acting Director of the Criminal Justice Clinic at The American University's Washington College of Law.
2. From September 1977 until December 1982, I was employed by the Department of Justice, Civil Rights Division, as a law clerk (1977-78), general attorney (1978) and trial attorney (1978-82) in the Special Litigation Section. The Special Litigation Section was responsible for enforcing the rights of individuals institutionalized in mental hospitals, mental retardation institutions, nursing homes, prisons, jails and juvenile training schools.
3. I resigned from the Department of Justice effective December 31, 1982. The reasons for my resignation were several. They included a desire to explore additional professional challenges; the opportunity to teach law at The American University; and differences with the leadership of the Civil Rights Division, including Wm. Bradford Reynolds, Assistant Attorney General, over the

Division's policies and practices with respect to enforcement of the rights of institutionalized persons.

4. Prior to the effective date of my resignation, but after I gave notice of my intent to resign, in late December 1982, I had an "exit interview" with Mr. Reynolds. This interview was a wide-ranging discussion in which we discussed, among other things, the reasons for my resignation. To the best of my recollection, we discussed the fact that my resignation was due in part to my differences with Mr. Reynolds and his assistants over their interpretation of the nature and scope of the rights of institutionalized disabled persons.

Robert D. Dinerstein

Sworn to and subscribed before me this 17th day of June, 1985

Notary Public

My Commission Expires April 14, 1989

STATEMENT
OF
DAVID J. W. VANDERHOOF

I am pleased to present this statement to the Senate Judiciary Committee during its consideration of the qualifications of William Bradford Reynolds, Assistant Attorney General, Civil Rights Division. My resignation as senior trial attorney from the Special Litigation Section was requested by Mr. Reynolds, effective March 1, 1983. My professional, ethical and moral disagreement with Civil Rights enforcement and litigation policies were well known to the leadership of the Special Litigation Section and to Mr. Reynolds personally. They formed the basis for and I believe were the reasons my resignation was requested.

After joining the Department of Justice in 1968 I was honored to have represented the United States in its efforts to insure that the rights of all citizens were respected and protected, a task which today requires a renewed and aggressive effort. As a trial attorney, I have appeared in federal courts throughout the country to advance and protect the rights of citizens who are mentally ill, retarded or otherwise handicapped; persons confined to prisons and jails; or who have sought equal employment opportunities. I have requested judicial abolition of racially and ethnically segregated trade unions, school districts, places of public accommodation and recreational facilities. In the prosecution of criminal civil rights statutes, I have obtained convictions (or guilty pleas) of persons who have dynamited school buses to prevent integration, fire bombed black-owned homes, possessed or manufactured illegal weapons intended to be used against the minority community, brutalized persons during apprehension, arrest or while in custody; prevented minorities from using a public restaurant and obstructed justice by attempting to interfere with a federal court order. Often these cases were of first impression and some have attained "landmark" status.

In the major areas of responsibility of the Special Litigation Section, issues relating to persons who are mentally ill or retarded and the rights of prisoners, I successfully litigated the leading case setting the standards and guidelines followed by subsequent activity and I initiated the seminal case regarding the rights and treatment of juveniles confined to state facilities. I joined the predecessor to the Special Litigation Section, the Office of Institution and Facilities, at its inception and remained throughout my tenure its most experienced trial lawyer. I declined opportunities to assume Section leadership preferring to remain active as a trial attorney. With this experience I am familiar with the thrust of the Section's activities.

Under the leadership of Mr. Reynolds the enforcement of Civil Rights, the recognition and protection of rights of substantial segments of people least likely to act or speak for themselves, has dramatically declined. Attorneys, once active in the prosecution of these activities, have been directed to retreat from positions previously taken and negotiate away, often for political expediency, gains secured through litigation. The morale of Special Litigation attorneys and their professional pride in representing the public interest, declined to paralysis levels. As the most senior litigator I often vocalized these concerns and declined to aggressively develop new cases in fear of the position I might be required to take. Being the recipient of awards presented from Attorney Generals of diverse political backgrounds, I represented the classic example of a good lawyer· gone sour. Although never afforded the reasons for my requested resignation, it is with honor that I responded to Mr. Reynolds' directive.

In my letter of resignation to Attorney General William French Smith, I concluded:

> It is with a sense of professional accomplishment and fulfillment, heightened awareness of ethical obligations and professional integrity that I leave the Department of Justice.

DAVID J. W. VANDERHOOF

U.S. Department of Justice

Office of Legislative and Intergovernmental Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

June 19, 1985

Honorable Strom Thurmond
Chairman
Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Mr. Chairman:

Pursuant to Senator Simon's request at yesterday's hearing for information concerning the number of attorneys who have left the Civil Rights Division over a period of years, I obtained that information this morning (attachment).

Sincerely,

Wm. Bradford Reynolds

Wm. Bradford Reynolds
Assistant Attorney General
Civil Rights Division

cc: Honorable Paul Simon

Memorandum

Subject	Date
Attorney Employment Information 1973 to 1984	June 18, 1985

To	From
Mark R. Disler Deputy Assistant Attorney General Civil Rights Division	Stephen R. Colgate Executive Officer Civil Rights Division

As requested, the following chart provides attorney employment for fiscal years 1973 to 1984:

Fiscal Year	Authorized Attorney Positions	Attorneys on Board End of Year	Attorney Departures
1971	157	145	17
1972	157	138	34
1973	198	160	35
1974	198	179	31
1975	198	176	33
1976	179	176	28
1977	185	171	31
1978	193	179	24
1979	201	173	25
1980	192	170	28
1981	192	162	32
1982	172	172	24
1983	172	168	34
1984	179	186	27

If you have any additional questions, please give me a call on 633-4224.

Senator **Hatch**. Could I ask one more question along this line? I know that it is not my turn to question, but I am concerned about making sure that this is resolved.

I would ask unanimous consent, Mr. Chairman, that we put the memorandum dated April 20, 1983, in the record as well so that we have everything in the record.

Senator **Biden**. What memorandum is the Senator referring to?

Senator **Hatch**. This is a memorandum to Timothy M. Cook from William Bradford Reynolds.

Could I ask you one other question, Mr. Reynolds? I take it when these people resigned, they differed with you and the policies that you represented in the Justice Department. At least this is what Senator Simon's inquiry seems to suggest.

Do you differ with that?

Mr. **Reynolds**. That is correct.

Senator **Hatch**. And you felt that it was the appropriate professional thing for them to do under the circumstances, is that right?

Mr. **Reynolds**. I certainly did.

Senator **Hatch**. Now, is there any reason why you would have a defection like that at this particular time? Was there a change in direction at the Office of Civil Rights, and if so, what was that change?

Mr. **Reynolds**. Well, Senator, my recollection is that the resignations did not come in large numbers at one time, but came over an extended period of time, and they were basically resignations from people who had been with the Department in the prior administration and disagreed with the policies and philosophies of William French Smith, Attorney General William French Smith, and that because of that disagreement they elected to leave the Department.

Senator **Hatch**. Even as some of our members of the committee may differ with you ideologically today, is that correct?

Mr. **Reynolds**. I believe that is correct, Senator.

Senator **Hatch**. I think that is what it comes down to, is it not?

Senator **Leahy**. Is the distinguished Senator from Utah suggesting we all resign?

Senator **Hatch**. Well, now, let me think that over [Laughter.]

Senator **Leahy**. The thought occurred to him.

Senator **Hatch**. I think the point that I am making is that there was a new administration, is that correct?

Mr. **Reynolds**. There was a change in administration.

Senator **Hatch**. And you have been trying to the best of your abilities to implement the policies of this administration, is that correct?

Mr. **Reynolds**. That is correct.

Senator **Hatch**. And these have been controversial policies, at least with regard to quotas and preferential treatment, is that right?

Mr. **Reynolds**. I think they have been controversial in a number of areas in addition to that, also, Senator.

Senator **Hatch**. As a matter of fact, this is a controversial set of areas, is it not?

Mr. **Reynolds**. It is very controversial.

Senator **Hatch**. And there is a wide-ranging, differing set of beliefs in these areas, is that right?

Mr. **Reynolds**. That is correct.

Senator **Hatch**. And there are sincere people on both sides, is that correct?

Mr. **Reynolds**. That is absolutely correct.

Senator **Hatch**. And even though you differ with some of the people in the Leadership Conference on Civil Rights, that does not mean that they are wrong and you are right, does it, or that you are right and they are wrong, does it?

Senator **Biden**. The answer is no. [Laughter.]

Senator **Hatch**. The answer may very well be yes, but the point is both are sincere, is that correct?

Mr. **Reynolds**. That is correct.

Senator **Simon**. Would the gentleman——

Senator **Hatch**. Have they ever attacked your sincerity, to your knowledge?

Mr. **Reynolds**. Not to my knowledge.

Senator **Simon**. Would the gentleman from Utah yield?

Senator **Hatch**. Yes.

Senator **Simon**. Let me just point out two things. The question is not who has resigned. The question is the candor of the witness.

Senator **Hatch**. All right.

Senator **Simon**. And on the question of the numbers of the turnover, I would like to enter into the record a memorandum from a former attorney, Robert D. Dinerstein, who, among other things, says this: "The number of individuals who have left in the time period noted is well beyond that to be expected from normal attrition."

I would like to enter that in the record, too.

[Memorandum follows:]

MEMORANDUM

TO: Laura Westley

FROM: Robert D. Dinerstein

RE: Some notes on attorney turnover in the Special Litigation Section, 1983 - present

DATE: June 17, 1985

I believe there were 18 attorney slots in the Section. Since I left in December 1982, I believe that all but two line attorney slots have turned over, as well as one of the three supervisory slots. Some of the line attorney slots have turned over more than once. I am aware of at least three attorneys who came to the section since I left and have in turn left themselves.

Put differently, there are only two line attorneys (one who started one month before I left) and two supervisors left who were in the Section when I left. This has been true for some time.

It is correct that attorneys leave the Civil Rights Division all the time. The Division has always attracted attorneys right out of law school who work for the Division for several years without intending to become career employees. (I certainly put myself in that category.) But the number of individuals who have left in the time period noted is well beyond that to be expected from normal attrition. I have no doubt that some people left who otherwise would have stayed for a long time, and others left at least somewhat in advance of when they would have but for policy differences with Mr. Reynolds.

You should also know that the number of people who signed the letter to Senator Simon probably understates the number who left at least in part for policy reasons. Some individuals are working in other divisions of the Justice Department, or in other government agencies, and understandably would be reluctant to sign a letter identifying policy differences with a high-ranking governmental official.

Finally, I think it is important to realize that the critical issue is not whether particular attorneys left at a particular time, or that the Section was somehow unable to replace the people who left. Nor should I or others be understood to be criticizing the ability or commitment of those attorneys now in the Section. Rather, when a number of people leave in such a short period of time, the Section's institutional memory inevitably suffers. Facts are misplaced, knowledge of witnesses fades, theories are left unpursued. Combined with the shitts in position engineered by Mr. Reynolds, this loss of institutional memory makes the Department of Justice a less valuable and less credible participant in the litigation process.

Senator **Hatch**. Well, if I could also make one other comment about candor, as I have listened to the witness, what he said was that he distinguished Mr. Cook's resignation from the others. Did I understand that correctly?

Mr. **Reynolds**. I certainly did.

Senator **Hatch**. His was a resignation under protest. He was darned mad, according to you, and left because he really violently disagreed with what was going on, is that right?

Mr. **Reynolds**. That is correct.

Senator **Hatch**. You did not feel that the others were violent leavings or that they were protests—Mr. Chairman, I ask that we have order in here.

The **Chairman**. Let us get quiet.

Senator **Hatch**. I think that people ought to show the witness and Senators respect, whether they would like to or not.

Now, Mr. Reynolds, is that not basically what you have been saying here? That is the way I have interpreted it and I think that is the way any reasonable person would.

Mr. **Reynolds**. That is what I said before. And, Senator, I have tried to be as candid and honest and straightforward, to the best of my recollection, throughout these hearings. I was not trying to mislead you or say anything that was inaccurate in any way, shape, or form.

As I understood your question, it related to the matter of whether there were a mass resignation as a result of one memorandum that had been written, and the second was whether there were resignations under protest.

And there have been any number of discussions and controversies throughout my tenure about whether a number of people should or should not be fired, whether a number of people are going to walk off in protest or not.

In the prior administration, there were a large number of employees of the Civil Rights Division that did walk out in protest, and I thought that your questions were aimed at specifically whether the memo that you had reference to was something that triggered a large number of resignations.

And my complete recollection of that today is as it was before. I do not recall that as being a triggering mechanism for a lot of resignations. And, similarly, the only one that was a protest that I regarded as a protest was Tim Cook's. These other people had—they did come to me. They had very fundamental differences. We talked about them in exit interviews.

My understanding with respect to most of them was that they had other jobs lined up at the time that they could go to. Mr. Vanderhof was the only exception that I can recall in that category.

Senator **Simon**. Then if I may, Mr. Chairman—and I do not want to prolong this, but then the witness misunderstood the question because there was no—if you reread the testimony, there is no reference to any memorandum by you and any resignations because of any memorandum by you.

Senator **Specter**. Mr. Chairman, may I ask whether we are going to follow a sequence of rounds of questioning, because there are many of us who have been waiting here for quite a time?

Senator **Biden**. If the Senator has been listening, there is a sequence. There is a question, there is the answer, there is a defense, the question, the answer——

[Laughter.]

Senator **Leahy**. The sequence is all laid out.

The **Chairman**. We have allowed a lot of freedom here when we got on one subject and let others come. I think we had better stick to the regular procedure.

Senator **Leahy**. Is there any opportunity for those of us who have not had our first round to get in some questions?

The **Chairman**. You are the last one, and you are now in order.

Senator **Leahy**. I beg your pardon?

The **Chairman**. You are now in order.

Senator **Leahy**. Mr. Chairman, I am struck dumb. [Laughter.]

I want to say that I am delighted to have this chance to be on your committee, Mr. Chairman. [Laughter.]

The **Chairman**. Senator Mathias.

Senator **Mathias**. Senator Simon just finished. I believe that in the regular order Senator Specter would be next.

Senator **Leahy**. Senator Specter has had either one or two rounds of questions and I have not had a chance yet, Senator Mathias, but I am willing to let people have third and fourth rounds if that is what the majority wishes to——

Senator **Mathias**. Whatever the chairman wants.

The **Chairman**. Well, the Senator from Vermont has not had any rounds, but he was late coming and I was going to yield to him next, but if he is not in a hurry and Senator Specter says he is, would you mind yielding?

Senator **Leahy**. Well, I do—they are holding a major Intelligence Committee meeting on a matter that the chairman is well aware of that is going on in Beirut right now, waiting for me in my capacity as vice chairman, and that is one of the reasons I have had to leave a couple of times today, Mr. Chairman.

But I have come back each time I was told it was going to be my turn, but there are a number of people——

The **Chairman**. I will recognize you next unless you yield to the Senator from Pennsylvania.

Senator **Specter**. Senator Leahy, if you can take 15 minutes now, it will be the fastest approach.

Senator **Leahy**. Thank you.

Mr. Reynolds, there has been some question about your candor in answering certain questions that Senator Specter and I have asked you.

Certainly, as I read the record, in the past it appears that I have asked questions in a particular area and you have given answers which appear to be of one nature. Senator Specter subsequently asked basically the same question and you gave answers of another nature.

The other day, I asked the same question again; your answer appears to be of yet another nature, and again today, Senator Specter raised it. I mention this only because it has reached a point where the substance of your answers is not as material as the series of answers given.

The record will speak for itself. You have answered the question several times and each member is going to have to make up his mind whether the answers are consistent or inconsistent. But let me go back to some other questions you have been asked.

When you appeared before the committee on June 4, I asked some questions about the statements or claim that you had made in connection with the petition to intervene in the Charleston, SC, school desegregation case.

Subsequent to that testimony, you submitted a further statement to the committee in response to testimony submitted by the Lawyers Committee for Civil Rights Under Law. In that subsequent statement, you again repeated that you had no recollection of ever using the term "bastards jumping through every hoop."

And you stated that you did not believe it was made by you or anyone else, but you qualified your statement by saying, and I quote you, "In any event, litigators approach litigation with an adversarial attitude. Thus, even if it were accurate, such a passing remark about a potential party asserting an adverse interest in litigation simply did not support the connotation suggested by the lawyers committee."

First, did the Department oppose intervention as a matter of right because the petitioners could not demonstrate that their interests were being inadequately represented by the United States?

Mr. Reynolds. I am sorry. Is that a question that you are reading?

Senator Leahy. Yes. Did the Department oppose intervention as a matter of right because the petitioners could not demonstrate that their interests were being adequately represented by the United States?

Mr. Reynolds. I think we did oppose it as a matter of right; that is correct.

Senator Leahy. So in other words, you maintain that you could, in fact, represent the interests of the intervenors, is that correct?

Mr. Reynolds. That is right; that is correct.

Senator Leahy. You had a statement you recently submitted to the committee. You said, "Thus, even were it accurate, such a passing remark about a potential party asserting an adverse interest in litigation simply does not support the sinister connotation suggested by the lawyers committee."

Now, that statement suggests to me that you felt the intervenors in the case were people with interests adverse to that of the United States. Am I reading that right?

Mr. Reynolds. I am not sure where you are reading from. If you could point me to the documents you are reading from so that I could follow a little better—I am sorry.

Senator Leahy. It was a June 5 submission that you gave to the committee.

Mr. Reynolds. OK. What page is it that you are reading from on that?

Senator Leahy. I will ask staff for the exact page.

The Chairman. You have three microphones, and the center one is the one that you want to talk into.

Senator Leahy. While we are finding that particular page, let me ask another question. Did you feel that the intervenors had an interest adverse to the United States, and what do you feel now today?

Mr. **Reynolds**. I believe the intervenor's interest was coincident with the interest of the United States in that case, and we filed a paper with the court which indicated that. That paper said that while we would oppose intervention as of right, we thought that permissive intervention would be an available vehicle at the appropriate time; that at the time they originally asked, we indicated we thought that it was premature but that at a subsequent time, when the delicate negotiations had run their course, that it would be proper for them to come in at that point, and we would invite them in.

Senator **Leahy**. You did not feel their interest was adverse to that of the United States? Is that your answer?

Mr. **Reynolds**. I thought that the interest of the intervenor, which was to end the de jure segregation and see to it that the de jure segregation came to a halt and was properly remedied, was one that was coincident with the United States.

Senator **Leahy**. Did you feel that it was adverse to the interest of the United States?

Mr. **Reynolds**. No, I did not think that the interest of the intervenors was adverse to the United States. I thought that we had the same general interest to desegregate the school system and devise an adequate remedy to accomplish that end.

Senator **Leahy**. What I was reading from before is your statement, a response prepared by you to the testimony of the Lawyers Committee for Civil Rights on the law that opposed your confirmation of June 5.

On page 18, the bottom of the page—do you have that?

Mr. **Reynolds**. Yes, I do.

Senator **Leahy**. Last sentence where you say, "Thus, even were it accurate such a passing remark about a potential party asserting an adverse interest in litigation simply," and so on. But you feel today they did not have an adverse interest?

Mr. **Reynolds**. I think their interest in the litigation was coincident with the United States' interest insofar as Federal rules for intervention are concerned.

Senator **Leahy**. A couple of minutes ago, you said it was not adverse.

Mr. **Reynolds**. I think that they had a difference of view as to how we should remedy the case. And there was definitely a divergence of views on that between the intervenors and myself, and that was a difference.

But for purposes of whether they could intervene as of right, it is accurate that the interest that was being promoted by the United States in that case was one that I felt was coincident with the interests of the intervenors where we——

Senator **Leahy**. Coincident but not adverse? Yes or no?

Mr. **Reynolds**. Where we had a difference was with regard to the appropriate remedy in these cases. And, of course, in that instance, we did have—I would say there was an adverse view of the matter.

Senator **Leahy**. So then your statement earlier they did not have an adverse interest is right, and the statement in the testimony you submitted to us that they did have an adverse interest is right, and if I understand your explanation, you feel that they can be both adverse and not adverse and you see nothing inconsistent with that, is that correct?

Mr. **REYNOLDS**. Well, I felt that the interest that we both had was in pursuing the segregation situation and ensuring that a desegregation remedy adequately addressed that.

We had a difference of view with regard to what the appropriate remedy is. The intervenors' view was that a mandatory student assignment remedy would be preferred over one that did not contemplate that, but rather contemplated the general magnet school approach. And in that regard we certainly did have a difference of view.

Senator **LEAHY**. Now, you stated on several occasions that you have no recollection of ever referring to the applicants for intervention as "bastards," or ever directing the attorneys in the Department to make them "jump through every hoop before acquiescing to their intervention." Is that correct?

Mr. **REYNOLDS**. I have no recollection of that.

The **CHAIRMAN**. He has answered that already.

Senator **LEAHY**. Do I understand that those statements were first brought to your attention——

The **CHAIRMAN**. Senator, just a minute.

Senator **LEAHY**. Yes.

The **CHAIRMAN**. We have had duplication after duplication here.

Senator **LEAHY**. Well, let me ask you another question that has not been asked.

The **CHAIRMAN**. And when you are not here, you miss a lot of it and you duplicate. And we have gone on long enough now. Ask your questions but do not duplicate.

Senator **LEAHY**. Let me ask you a question that has not been asked.

I understand that those statements were first brought to your attention in a memorandum from a lawyer in the Civil Rights Division, Gregg Meyers, to the Attorney General.

Is that correct?

Mr. **REYNOLDS**. I believe that is correct.

Senator **LEAHY**. In your September 12 reply to Mr. Meyers, which you quoted in a letter to Carl Rowan and which we discussed at our last hearing, you stated you had been unable to confirm that such a remark was made and you seriously doubted the accuracy of this quotation.

Now, in attempting to confirm whether the remarks were in fact made, you talked with Mr. Meyers and asked him what was the basis for his memorandum.

Mr. **REYNOLDS**. I did not at that time. I talked with the other officials in the Division whom the memorandum had indicated had made a statement, that had been made by an official of the Department—of the Division. And I talked with the other officials in the Division.

Senator **LEAHY**. Did there come a time that you did talk to Mr. Meyers and ask him what was the basis for his memorandum?

Mr. **REYNOLDS**. We did have a conversation.

Senator **LEAHY**. Did Mr. Meyers tell you that he distinctly remembered that you had used those words?

Mr. **Reynolds**. I believe he did say words to that effect, yes.

Senator **Leahy**. And did you attempt to confirm whether those remarks were made? Did you talk with one of the other attorneys working on this case, a Jay Heubert?

Mr. **Reynolds**. I did, Senator.

Senator **Leahy**. And did he have a recollection that you had, in fact, made those remarks?

Mr. **Reynolds**. He had a recollection that I had made those remarks.

Senator **Leahy**. And, Mr. Chairman, I would ask at the conclusion of the questions that the affidavits of Mr. Heubert and Mr. Meyers be included in the record.

Mr. Chairman.

The **Chairman**. Well, he has admitted that they said that. If you want them in the record, we can put them in.

Senator **Leahy**. Thank you.

The **Chairman**. I just want to save the taxpayers money by not putting more documents into in the record.

Without objection, it will go in the record.

[Information follows:]

QUESTIONS TO JAY P. HEUBERT

1. Please state your current employer and job title.

2. How long have you been employed as a trial attorney in the Civil Rights Division?

3. While working in the Civil Rights Division, have you had the occasion to represent the United States or otherwise work on the case of *U. S. v. Charleston County School District*, Civil Action No. 81-50-8 (District of South Carolina)?

4. Subsequent to the filing of the petition to intervene by Richard Ganaway *et al.* , in *U. S. v. Charleston County School District*, did you attend a meeting or meetings with Assistant Attorney General William Bradford Reynolds in which you discussed the motion to intervene?

5. During the course of such meeting or meetings did Mr. Reynolds ever refer to the applicants for intervention (which includes any applicant or any number of applicants or any attorneys for the applicants) as "those bastards"?

6. During the course of such meeting or meetings did Mr. Reynolds state that he wanted to make the applicants for intervention "jump through every hoop" (or substantially identical language) before the Department would acquiesce in their intervention?

7. During the course of such meeting or meetings did Mr. Reynolds ever mention his view or belief that if the applicants for intervention were permitted to intervene, they would raise the issue of court-ordered busing?

8. If the answer to question 7 is yes, please briefly state the substance and circumstances of any comments Mr. Reynolds made concerning the desirability of bringing the issue of court-ordered busing into the case, or the desirability of acquiescing to the intervention of parties who would bring the issue of court-ordered busing into the case.

9. During the course of such meeting or meetings did Mr. Reynolds instruct Department attorneys to oppose the application for intervention on the grounds that the United States adequately represented the interests sought to be represented by applicants?

10. Did Mr. Reynolds ever ask you to confirm whether you heard him refer to the applicants for intervention in U. S. v. Charleston County School District as "bastards" and whether he instructed Department attorneys to make such applicants "jump through every hoop" (or substantially identical language) before the United States would acquiesce in their intervention?

11. Did you confirm to Mr. Reynolds that he made those statements, and if so, when?

12. Are you familiar with the Response of the United States to the First Requests for Admissions of the Applicants for Intervention filed by the United States in U. S. v. Charleston County School District?

13. Prior to the filing of that Response, were you asked for your opinion, knowledge or otherwise consulted about the United States' response to the request for admissions?

14. If the answer to question 13 is yes, with whom did you have such discussions?

15. If the answer to question 13 is yes, please briefly state the circumstances and substance of such conversations.

16. Did you prepare, in part or in whole, the filing entitled Response of the United States to the First Requests for Admissions of the Applicants for Intervention in U. S. v. Charleston County School District?

17. Did you sign the certificate of service which accompanied the filing referred to in question 16?

18. Were you ever asked to sign the filing referred to in question 16?

19. If the answer to question 18 is yes, who asked you to sign the filing?

20. Did you ever refuse to sign the filing referred to in question 16 or any other draft of that filing?

21. If the answer to question 20 is yes, state the circumstances and reasons for your refusal.

22. Was it customary for Mr. Reynolds to personally sign pleadings in U. S. v. Charleston County School District?

23. Could you provide the Committee with any other Court paper in that case which Mr. Reynolds personally signed?

24. Finally, did anyone other than yourself either assist in the preparation of the answers to the above questions or review these answers to the above questions (or earlier drafts or versions of these answers) prior to your executing and submitting them?

25. If so, who did so and on the basis of such assistance or review, what changes, amendments or alterations were incorporated into the response you are executing and submitting herein?

STATEMENT OF JAY HEUBERT, DEPARTMENT OF JUSTICE

1. Trial Attorney, Educational Opportunities Litigation Section, Civil Rights Division, U.S. Dept. of Justice

2. Since December 29, 1980.

3. Yes.

4. Yes.

5. Yes.

6. Yes, though initially he declined to specify any circumstances under which we would "acquiesce" in their intervention.

7. Yes.

8. Mr. Reynolds acknowledged during a meeting on the U.S. response to the Ganaway intervention motion that the applicants for intervention satisfied all the requirements for permissive intervention. He nonetheless instructed us to draft our response so as to oppose even permissive intervention, saying, "Those bastards just want to bring in the busing issue. . . They're probably entitled to intervene, but let's make them jump through every hoop."

9. Thomas Keeling, Gregg Meyers and I recommended to J. Harvie Wilkinson and Mr. Reynolds that we oppose intervention of right on the ground that the U.S. represented adequately the interests of the applicants for intervention. This has been common practice for the U.S. in responding to intervention motions of this kind. We also recommended, however, that we support permissive intervention, a position the U.S. also used to take routinely, and one with which Mr. Wilkinson agreed. Mr. Reynolds, however, opposed both intervention of right and permissive intervention.

10. Yes.

11. Yes. On October 31, 1983, while he and I were discussing the United States' response to the applicants for Intervention's First Requests for Admission, he asked me whether I recalled his making such statements. I said that I did recall his making them, and described to him the context in which he had made the statements.

12. Yes. I worked directly with Mr. Reynolds on this Response.

13. Yes.

14. William Bradford Reynolds

15. Mr. Reynolds and I met several times on October 31, 1983, to discuss the U.S.'s response. I told Mr. Reynolds that in my view it would be permissible to decline to respond to the requests on the ground that they had been propounded on behalf of persons not party to the lawsuit. He said he wanted to respond on the merits, and told me how he wanted to respond to each request. I prepared a draft along the lineshe had indicated. At that time I deleted from the signature page all names except his, because I did not believe the responses to be full and accurate. [Thomas Keeling, then Chief of the Section I was in, concurred when I suggested to him that his name, my name and Gregg Meyers' name be deleted from the Response.] He subsequently modified that draft himself. I had his modifications made, and late that day he signed the final version. At that time, he asked me whether I "had any problems" with his answers. I replied that I could not know what he did or did not recollect, and so could not say that the response was false. I did say, however, that I did not think the requests had been answered fully.

At that time he asked me whether I recalled his having referred to the applicants for intervention as "bastards" and saying they should have to "jump through every hoop." I told him that I did recall his having made such statements, and described to him the circumstances in which he had made them.

16. I prepared the Response pursuant to Mr. Reynolds' instructions, as noted above.

17. Yes

18. No. Mr. Reynolds never even asked why I had deleted from the Response all names except his.

19. ----------

20. I was never put in the position of having to formally refuse. As noted above, with the concurrence of my Section Chief I deleted all names save Mr. Reynolds' because I did not consider the Response to be as full, complete and straightforward as they should have been.

21. See responses to numbers 15 and 20.

22. No. To my knowledge it is the only pleading he has signed to date in that case. He has, of course, signed some of the correspondence in this case, which is not unusual.

23. I am not aware of any other pleadings signed by Mr. Reynolds. He has, of course signed letters, sent us internal notes and memoranda, and modified and amended proposed letters and pleadings, all in his own handwriting, for this case and others.

24. Thomas Keeling, then Chief of the General Litigation Section, did look at all drafts before I took them to Mr. Reynolds. He did not assist in preparing them, nor did he really review them, since Mr. Reynolds himself had decided what the precise wording of each response would be.

25. For reasons noted in response number 24, no such change, amendment or alteration by anyone other than Mr. Reynolds was incorporated into the response.

I have answered these questions fully and honestly. Before answering any questions, Nathaniel Douglas, my Section Chief, spoke with Mr. Reynolds and told me that I had Mr. Reynolds' permission to answer these questions.

Jay P. Heubert
6/17/85
4:50 P.M.

QUESTIONS TO GREGG MEYERS

1. Please state your current employer and job title.

2. How long have you been employed as a trial attorney in the Civil Rights Division?

3. While working in the Civil Rights Division, have you had the occasion to represent the United States or otherwise work on the case of U. S. v. Charleston County School District, Civil Action No. 81-50-8 (District of South Carolina)?

4. Subsequent to the filing of the petition to intervene by Richard Ganaway *et al.* , in U. S. v. Charleston County School District, did you attend a meeting or meetings with Assistant Attorney General William Bradford Reynolds in which you discussed the motion to intervene?

5. During the course of such meeting or meetings did Mr. Reynolds ever refer to the applicants for intervention (which includes any applicant or any number of applicants or any attorneys for the applicants) as "those bastards"?

6. During the course of such meeting or meetings did Mr. Reynolds state that he wanted to make the applicants for intervention "jump through every hoop" (or substantially identical language) before the Department would acquiesce in their intervention?

7. During the course of such meeting or meetings did Mr. Reynolds ever mention his view or belief that if the applicants for intervention were permitted to intervene, they would raise the issue of court-ordered busing?

8. If the answer to question 7 is yes, please briefly state the substance and circumstances of any comments Mr. Reynolds made concerning the desirability of bringing the issue of court-ordered busing into the case, or the desirability of acquiescing to the intervention of parties who would bring the issue of court-ordered busing into the case.

9. During the course of such meeting or meetings did Mr. Reynolds instruct Department attorneys to oppose the application for intervention on the grounds that the United States adequately represented the interests sought to be represented by applicants?

10. Following such meeting or meetings did you prepare a memorandum to the Attorney General which discussed what occurred or anything that was said at any meeting or meetings referred to above?

11. Please attach a copy of such memorandum.

12. Did you receive a written reply to this memorandum?

13. Please attach a copy of any written reply you received.

14. Did you receive any other response to the memorandum referred to above?

15. Could you please describe the circumstances and substance of any such response?

16. Are you aware of whether Mr. Reynolds had an opportunity to review the memorandum referred to in question 10?

17. Did Mr. Reynolds ever discuss with you the contents of that memorandum?

18. Do you recall when such discussion took place?

19. Did Mr. Reynolds ever ask you to confirm whether you heard him refer to the applicants for intervention in U. S. v. Charleston County School District as "bastards" and whether he instructed Department attorneys to make such applicants "jump through every hoop" (or substantially identical language) before the United States would acquiesce in their intervention?

20. Did you confirm to Mr. Reynolds that he made those statements?

21. Are you familiar with the Response of the United States

to the First Requests for Admissions of the Applicants for Intervention filed by the United States in U. S. v. Charleston County School District?

22. Prior to the filing of that Response, were you asked for your opinion, knowledge or otherwise consulted about the United States' response to the request for admissions?

23. If the answer to question 22 is yes, with whom did you have such discussions?

24. If the answer to question 22 is yes, please briefly state the circumstances and substance of such conversations.

25. Did you prepare, in part or in whole, the filing entitled Response of the United States to the First Requests for Admissions of the Applicants for Intervention in U. S. v. Charleston County School District?

26. Did you sign the certificate of service which accompanied the filing referred to in question 25?

27. Were you ever asked to sign the filing referred to in question 25?

28. If the answer to question 27 is yes, who asked you to sign the filing?

29. Did you ever refuse to sign the filing referred to in question 25 or any other draft of that filing?

30. If the answer to question 29 is yes, state the circumstances and reasons for your refusal.

31. Was it customary for Mr. Reynolds to personally sign pleadings in U. S. v. Charleston County School District?

32. Could you provide the Committee with any other Court paper in that case which Mr. Reynolds personally signed?

33. Finally, did anyone other than yourself either assist in the preparation of the answers to the above questions or

review these answers to the above questions (or earlier drafts or versions of these answers) prior to your executing and submitting them?

34. If so, who did so and on the basis of such assistance or review, what changes, amendments or alterations were incorporated into the response you are executing and submitting herein?

STATEMENT OF GREGG MEYERS, DEPARTMENT OF JUSTICE

1. United States Department of Justice Trial Attorney, Educational Opportunity Litigation Section.

2. Almost six years. I began in October, 1979 (October 9).

3. Yes. I have been an attorney on the case since it was filed (January 9, 1981). I've been lead attorney since roughly May, 1981.

4. Yes. We met in October, 1982, to discuss our position on the motion.

5. Yes. He stated, "Those bastards [the Legal Defense Fund] are just going to come in and argue for busing."

6. No. Although the comment quoted is accurate, it was not his intention, as I understood it, to have the intervenors satisfy that standard before the Department would acquiesce in intervention. The comment was more to the effect of what would occur before intervention might be granted by a court.

7. Yes. See response to #5.

8. My recollection is that there was little additional discussion of busing. I recall indicating that from what I knew from contacts of individual members of the client group that LDF (the Legal Defense Fund) represented, that there was no certainty that LDF would ask for busing. Mr. Reynolds generally indicated that he did not think my scepticism was well-founded, but I do not recall the comments. We all know that Mr. Reynolds opposes busing to desegregate schools.

9. My recollection of our pleading is that we took the position that we adequately represented the applicants' interests. We had recommended that we take that position in opposing intervention of right, but then we went on to originally recommended supporting permissive intervention. That is the position that I am told the Civil Rights Division traditionally has taken -- to oppose intervention of right but support permissive intervention. We did not do that here, although we did spell out conditions under which we might support permissive intervention. It appears in our pleading.

10. I prepared a memorandum to the Attorney General in August, 1983, some months after the meeting duscussed above. In the course of that memo I mentioned these comments as well as a number of other incidents. I did not in that memo discuss issues pertaining to busing, nor did I attribute any comments to identified individuals.

11. A copy has been provided.

12. Not from the Attorney General. I did receive a written reply from Mr. Reynolds, to whom I had sent a copy of my memorandum to the Attorney General.

13. A copy has been provided.

14. (A) On my initiative, I discussed it with Mr. Reynolds. (B) We'd also discussed it once at his request. (C) Twice at his request.

15. (A) I stopped into his office one evening to discuss it with him. I thought from his response that my memorandum had been misunderstood. We generally discussed the issues in the memo, and I thought I'd established a sufficient basis for a continued professional relationship.
(B) When Mr. Reynolds gave me his reply memorandum he did so by calling me into his office. He indicated his surprise at my memo, and gave me his written reply. In response, after reading it, I sent a single-page response to both the Attorney General and Mr. Reynolds. I did not respond further.
(C) About two months after I wrote my memorandum, I received a call from Mr. Reynolds. Someone had made my memorandum public, and Mr. Reynolds informed me that he felt now he needed to make his response public, which I thought only fair, and appropriate. He also asked me to identify the person who I had claimed had made the comments discussed in nos. 5 and 6. I told him that he had made the comments. After it was publicized, I got comments from a variety of individuals, but nothing written and not in response to the memo.

16. Yes, he did. I sent a copy of it to him, and he indicates in his reply memorandum that he had received it. Apparently the Attorney General also sent him a copy.

17. Yes.

18. We discussed it as described in Nos. 14 and 15. Discussion B occurred when he made his reply, probably near the same date as his reply (shich I believe is 9/12/83). Discussion A occurred later the same day of his response, or possibly the next day. It was soon after, at any rate. I didn't want it to linger too long.
Discussion C occurred the day after the memo became public. A colleague had told me that he'd seen a news article which mentioned my memo, and the call from Mr. Reynolds was the next morning. All those events occurred in the day or two following the resignation of Tim Cook, a trial attorney in the Civil Rights Division who resigned in October, 1983, possibly October 18. If the resignation date is accurate, then the discussion in C was either the 19th or the 20th of October. One or two days after the resignation by Mr. Cook and the attendant publicity.

19. Yes. See 15 (C) and 18.

20. Yes. See 15 (C) and 18. I explained the "hoops" comment as described in No. 6.

21. Yes. I have read it.

22. No. I was in South Carolina on DOJ travel when that document was received. Mr. Heubert was primarily responsible for preparing it. That's my recollection, which can be checked.

23. --------

24. --------

25. No. As I recall I did not.

26. No.

27. No.

28. --------

29. No. I did not have, or at least don't recall having, any opportunity to sign or not sign.

30. --------

31. No. It is customary for trial attorneys to sign all pleadings. This varies as to who is available (ie., if someone is out of town). I don't believe Mr. Reynolds has signed any other pleadings, for example. Usually the trial team consists of more than one attorney, so either one of the trial attorneys, or the section reviewer, signs pleadings if the person or persons who've done the bulk of the work are not available.

32. I keep the records of pleadings on that suit, and could provide such documents to the Committee if we have them. I don't believe there are any, however.

33. No.

34. ---------------

Gregg Meyers
6/17/85
4:30 P.M.

READEX
FICHE

Senator **Leahy**. Now, did you talk with these gentlemen prior to your September 12 reply which I quoted previously?

Mr. **Reynolds**. I do not believe I did, not prior to that.

Senator **Leahy**. Are you sure of that?

Mr. **Reynolds**. I am not sure of that.

Senator **Leahy**. Now the intervenors in that case also filed requests for admission in the case, one of which asked the United States to admit that you had instructed the trial attorneys to make the applicants for intervention "jump through every hoop before they are allowed to intervene." The United States responded to that request for admission by stating, "The Assistant Attorney General does not recall making any such statement."

Now, the admission was directed, of course, to the United States, not to the Assistant Attorney General for Civil Rights.

You knew that at least two attorneys who were in the Division had good records specifically recalled your making those statements.

Do you think rule 36 requires that you be more candid in your response?

Mr. **Reynolds**. Senator, I had no recollection of response. As I understood, it was addressed to admissions by me, and I answered it and signed it as admissions by me.

Senator **Leahy**. Is that because you answered Mr. Meyers' memorandum to the Attorney General by stating that you could not confirm whether or not you made the quoted remark before you made any effort of confirmation?

Mr. **Reynolds**. Well, I made an effort to confirm it. I talked to the officials in the Division who the remark was allegedly made by. And there was no recollection by those officials.

Senator **Leahy**. Did you send your answer to the Attorney General saying you could not confirm the remarks before or after you talked to the people who said they were present and heard you make the remarks?

Mr. **Reynolds**. What memorandum are you talking about, Senator?

Senator **Leahy**. Mr. Meyers had written a memorandum to the Attorney General. You answered it by stating that you could not confirm whether or not you made the quoted remarks.

Is that correct?

Mr. **Reynolds**. I believe that is correct. I mean I——

Senator **Leahy**. Well, is it correct or is it not correct?

Mr. **Reynolds**. Well, you have the document, Senator, and I do not. But I am not differing with you. I am sure it is correct if you are reading from the documents.

Senator **Leahy**. Now, did you make the reply to the Attorney General that you could not confirm whether or not you had made the quoted remark before you talked to the people who, according to their affidavits, were able to say whether you had made the remarks or not?

Mr. **Reynolds**. I believe my—well, what is the date of my response to the Attorney General? I am not sure when that is. I believe I made it before I had talked to them, but I do not have the dates in front of me.

Senator **Leahy**. My understanding is that you made your response, which apparently is your understanding also, to the Attorney General on September 12. That was prior to the time that you asked these other gentlemen whether you actually made the remarks.

Mr. **Reynolds**. I believe that is correct.

Senator **Leahy**. Now, you then quoted your answer to Mr. Meyers' memorandum when you wrote to Mr. Rowan. But, at that point, you had spoken to Mr. Meyers and Mr. Meyers had told you that you had made the remarks, is that not correct?

Mr. **Reynolds**. What is the date of the letter to Mr. Rowan? I really do not—I do not know—I do not have any recollection, Senator, of what the sequence of events was.

Senator **Leahy**. October 25.

The **Chairman**. Senator, your time is up. Take a couple of minutes to wind up.

Senator **Leahy**. Do I get more time if I start defending Mr. Reynolds, Mr. Chairman?

The **Chairman**. Well, we might consider that. [Laughter.]

Senator **Leahy**. That is because you have such a strong feeling of stare decisis in this case, is that it?

The **Chairman**. No. I have a strong feeling that this man should be confirmed.

Senator **Leahy**. No, I will wait for another round rather than get cut off halfway through the question. I do not think it is fair either to me or to the witness.

The **Chairman**. The distinguished Senator from Pennsylvania.

Senator **Specter**. Thank you, Mr. Chairman.

Mr. Reynolds, I would like to pursue the subject of what I am concerned about as a possible pattern of your elevating your own legal judgments over the judgments of the court. And I repeat what I said at the outset of my first round of questioning, that I believe that the President has every right to establish policies which he sees fit and that you have every right and obligation as an advocate to press vigorously points of legal advocacy.

And I note what Senator Hatch has made a comment about, the question of policy. And the concerns that I have arise in a number of contexts where there appears to me to be a strong position that your own views are being substituted for established principles of law.

Let me start with the *Stotts* case where, at our earlier hearing, you stated that three circuits had disagreed with your conclusions on *Stotts*.

My question to you is why do you not accept that legal judgment of some impressive proportion, the courts of appeals for three circuits, second, sixth, and eleventh, and follow that statement of the law in all the circuits?

Mr. **Reynolds**. Senator, I have a disagreement, and we have a disagreement with regard to the decisions that were reached in those three cases. I think it is certainly the case that three courts reached their solutions on somewhat different reasoning. And our view is that the Supreme Court decision is clearly responsive to the various rationales or reasonings that were advanced in the court of appeals.

On the other hand, I will say to you, Senator, that because those circuits have reached those decisions, they certainly are the binding precedent in those circuits and that, therefore, we are not advancing our position in those circuits until the appellate court cases—until there has been an opportunity to review those appellate court decisions.

Senator Specter. Let us set-aside for a moment your action in those three circuits.

Mr. Reynolds. All right.

Senator Specter. And let us deal with the balance of the circuits. Now, when you appeared earlier in these confirmation hearings, you said that you agreed, well, Senator—I am reading now from page 87—"Well, Senator, I agree with you that those three circuits do disagree with my reading of *Stotts* or the *Memphis Firefighters* case, at least insofar as it has application to consent decrees." And you go on to talk about some other matters, and there are other lines where there could be disagreement. But let us focus, in order to establish the point, that you agree that those three courts of appeals said you were wrong as to your interpretation on *Stotts*, at least as to consent decrees.

Now, that being the case, why do you not, as Assistant Attorney General, accept that statement of law until and unless the Supreme Court overrules those decisions by the courts of appeals for three circuits?

Mr. Reynolds. Well, Senator, the Supreme Court—in order to have a clarification by the Supreme Court of the *Stotts* decision, there needs to be a case that gets before the Court. It is not altogether clear whether any of those cases are ones that the Court is going to grant certiori on and accept for review at this stage.

They are all ones that are at the stage where a petition is, I think, to be filed or has been filed before the Court, and the Court then would have to agree to take that.

We believe that the legal argument we are advancing is the correct one and that it would be useful since there is such a controversy over the interpretation to have another case go to the Supreme Court. So I think that to that extent if, indeed, it becomes necessary to advance the argument in court again, we would take the same legal position to seek clarification from the Court, from the Supreme Court—I am sorry.

Senator Specter. The Supreme Court of the United States may grant cert in the second circuit opinion, or the two sixth circuit opinions or the eleventh circuit opinion.

Mr. Reynolds. That is correct.

Senator Specter. You do not know whether they will or they will not.

Mr. Reynolds. I do not.

Senator Specter. If you are saying that you want to have more potential test cases in the pipeline, you have already got four. The issue here really is whether you are going to subject a great many people in this country to your views of the law where three circuits have ruled in a series of cases that you were wrong. And it raises a real question in my mind as to whether the reason which you now advance that you want to bring another test case to the Supreme Court has sufficient validity where you are subjecting a lot of people to your own views which are at variance with the stated law by three courts of appeals.

Mr. REYNOLDS. Well, Senator, I do not—as I indicated when I was here before, our plan is not to pick fights, it is not to go into other districts and generate litigation on this issue. But it does seem to me that there is the potential, given the fact that we have some decrees out there with quota provisions, that if a jurisdiction begins to hire or promote in accordance with a race conscious or sex conscious quota, that there is going to be an objection raised by individuals who feel that they are being passed over by reason of race, and for no other reason. We are parties to those decrees, and I think at that point that it is appropriate for us to advise the Court as to what the views are of the Government with regard to that legal issue. In that situation it would be another piece of litigation that I think could well be a vehicle for Supreme Court clarification.

Senator SPECTER. Well, it may be, but you have a number of vehicles available at the present time. And the question comes back, and you and I had discussed this during the course of our private meeting earlier when I was seeking some way to try to accommodate to your views, and what I consider to be the stated and established law. And then when we had the earlier hearing, you said that you would not pick a fight.

But in the context of your further reply where you say if there is any hiring, as there inevitably will be in many of those situations, that by your standard gives you latitude to go into the other circuits and raise issues which are at variance with what three courts of appeals have held to be the law.

The CHAIRMAN. Senator, I might just make this statement at this point.

In 1896, the *Plessy* v. *Ferguson* case decided separate but equal facilities in schools. As time went on, there were suits brought. And in 1954, the case of *Brown* v. *Board of Education* offset that decision. And the Justice Department entered that suit. In other words, they agreed that that decision should be changed, and that was changed.

Now, if the Justice Department decides any time that any decision is not in keeping with the best interests of the people, the Justice Department, I think, would have a right to enter a suit. And it would not be defying the law. It would be merely asking the Court to review it as *Brown* v. *Board of Education* did.

And as I understand, that is all he is doing here. He is not trying to contest a whole lot of cases. He may take one case to the Supreme Court. If they affirm it, OK. If they do not, well, then they will reverse is just like they did in *Brown* v. *Board of Education.*

Senator SPECTER. Mr. Chairman, I think it would be fine if he had a case where he sought to reverse the Supreme Court of the United States. He has already got four of them.

Contrary to what you have asserted, Mr. Chairman, that is what Mr. Reynolds and the Civil Rights Division is seeking to do, to raise the issue in many, many cases. It is not simply a matter of taking the case back to the Supreme Court. He has an adequate vehicle for that.

And what I——

The CHAIRMAN. Well, he can test one case. It would not be necessary to take them all, whichever one comes first.

Senator SPECTER. But he has four now.

The CHAIRMAN. Well, he has four, but only one would go there first. And whichever way they decide that case, that would determine the rest of them.

Senator SPECTER. Well, you and I agree. Then what is the point of all the rest of the cases? That is why I would like him to pursue——

The CHAIRMAN. Of course, he wants to get out one as quick as he can. Sometimes you can get out one quicker in one section that you can another.

Senator SPECTER. Well, he has got four which are already incubated, Mr. Chairman. It is not going to be as fast to bring another case in another district court and go through the pipeline where he already has four which have been decided by the courts of appeals. And petitions for cert, as Mr. Reynolds has stated, have already been filed.

I ask this question, Mr. Reynolds, really in the context not exclusively in this area, but of some followup questions which I have. And let me move to the phase as to what is happening within the circuits and let me take the *Buffalo* decision.

I had started to say earlier when I had a few minutes from Senator Hatch which were occupied otherwise, that the *Buffalo* case raised a contest as it was asserted on the very extensive legal papers filed by the lawyers committee and by you as to what the underlying facts were.

And I turn to page 32 of your 56-page submission where you state that:

> Our motion to modify the title VII consent decree in the *City of Buffalo* case demonstrates the Division's—well, you begin—let me back up just a bit.
>
> Accordingly there is no merit in the lawyers committee's assertion that our motion to modify the title VII consent decree in the city of Buffalo cases demonstrates the Division's disregard for the rule of law. The motion was filed before we learned of the second circuit's decision in *Local 638*. When we did learn of the decision, we filed a brief acknowledging that had foreclosed the district court from granting our motion.

Now, I read this after I read the lawyers committee's first assertion.

Then I note that the lawyers—then I notice the followup by the lawyers committee was then recited in this chronology: that, on January 16, 1985, the second circuit handed down its opinion in *EEOC* v. *Local 638*. On January 30, 1985, the Government filed its motion allegedly based on *Stotts* for perspective modification without mentioning local 638.

Then there are some other things stated which I will pass because they are not directly relevant.

On April 18, 1985, the Government filed its reply memorandum acknowledging the binding authority of local 638. However, it declined to withdraw the motion to modify.

Then May 17, 1985, oral argument was held. The Government acknowledging local 638, declining to withdraw the motion, and urging the court to decide.

The first question I have, Mr. Reynolds, and ancillary to that—this may not be your writing, but you may know the underlying facts, you say that the motion was filed before we learned of the second circuit's decision in *Local 638.*

Now, the motion was filed on January 30, and the second circuit opinion was on January 16.

So my question to you is did you not know of the second circuit opinion which was handed down 2 weeks earlier before your motion was filed?

Mr. **Reynolds**. No, we did not know about the second circuit opinion before the motion was filed.

Senator **Specter**. You did not have notice even though 2 weeks had elapsed?

Mr. **Reynolds**. No, we did not. And that checked with the lawyers in the case. There was not knowledge of it.

Senator **Specter**. How do you account for that, if you can?

Mr. **Reynolds**. Well, Senator, that really is not all that unusual. There are an awful lot of decisions that are handed down in the courts on a lot of matters in a lot of areas. And if we are not involved in the case directly, then we do not necessarily get the notice of that.

That was a case involving the EEOC, and we just did not have information about it. It came to us afterwards.

Senator **Specter**. Well, but you were involved in the case, were you not?

Mr. **Reynolds**. I do not believe we were involved in the case. The *Local 638* case?

Senator **Specter**. Well, you were on January 30, when——

Mr. **Reynolds**. The EEOC——

Senator **Specter** [continuing]. You filed your motion.

Mr. **Reynolds**. That was the *Buffalo* case I believe. The *Buffalo* case is the one that we were involved in.

But I thought you asked whether we had knowledge of *Local 638,* which was the second circuit decision. And I believe that was the *EEOC* case. The Department of Justice was not involved in the second circuit decision, and we did not get word of that until 2 weeks after we——

Senator **Specter**. At page 13 of the reply by the lawyers committee, they are referring to the—they say thus, the suggestion that the efforts to relitigate the city of Buffalo decree were halted as soon as he learned of the second circuit's decision in *Local 638* is disingenious at best.

What action did you take on the *City of Buffalo* case after you learned of the second circuit's opinion in *Local 638?*

Mr. **Reynolds**. We filed a reply brief and advised the court that it would be bound by the circuit rule as it was announced in *Local 638.*

Senator **Specter**. Well, is it true, as asserted by the lawyers committee, that although you acknowledged the binding authority of the *Local 638* case in the second circuit, that you urged the court to grant your motion nonetheless?

Because that is what they say.

Mr. **Reynolds**. To grant the motion in *Buffalo?*

Senator **Specter**. Yes.

They say on April 18, 1985, that you filed a brief, memorandum, acknowledging the binding authority of the second circuit opinion in 638 but you declined to withdraw the motion to modify.

And then, on May 17, oral argument was held. And you declined to withdraw the motion and urged the district court to decide the case.

Mr. REYNOLDS. That is correct.

That is in the *Buffalo* case. And we did that. And we acknowledged that the binding authority of *Local 638* would control in this case, and we urged the district court to decide the matter then and indicated that it was bound by that authority.

The district court has just as recently as, I believe, last week, rendered its decision and indicated that it was indeed bound by *Local 638.*

Senator SPECTER. Well, Mr Reynolds, when I read laboriously your 56-page brief and came to this line on page 32, when we learned of the decision, we filed a brief acknowledging that it foreclosed the district court from granting our motion, quote, unquote.

I concluded that when the second circuit had decided contrary to your position, you stopped asserting your position in the *Buffalo* case.

Mr. REYNOLDS. What we told the court is that it would have to decide the case based on the controlling precedent. And we expected it to decide it, indeed told it it had to decide it, against us; it was a way to get the case up through the process to the Supreme Court—that is to the court of appeals and the Supreme Court. We did the same thing in the *Baby Doe* case, Senator, where the second circuit had a precedent, and we deemed that precedent as being controlling even though it was adverse to us. But we asked for the court to go ahead and decide the case against us so that we could then move it through the process and get a definitive determination in the Supreme Court. And that is the same thing in *Buffalo.* We went back and told the district court we recognize you have to decide against us, but we think that you ought to go ahead and decide this case against us so that we can get the issue resolved by a higher court.

Senator SPECTER. Well, Mr. Reynolds, is that abandoning your position in cases in the second circuit?

Mr. REYNOLDS. I do not—my position is we would not initiate a case. This was one—*Buffalo* was initiated by another party. The briefs were on file with the district court at the time this occurred and, therefore, since it was already in process and going forward, and there were other litigants in the case, we took that position in the district court and told them to decide it, that we thought it had to decide the case against us.

But I had indicated that we would not be initiating cases in a circuit where indeed they had ruled against us. And I think that is absolutely the fact.

Buffalo was one that the private litigants had initiated, and then we came in with our motion.

Senator SPECTER. Well, Mr. Reynolds, I do not think you said you would not be initiating cases in the circuit which had decided against you. I think you said that you would not be litigating these principles in the circuits which had decided against you.

The **Chairman**. Senator, your time is up.

Senator, your time is up.

Senator **Specter**. I will wrap up on this point.

The **Chairman**. You can take a minute to wind up.

Senator **Specter**. Yes, I think I can, Mr. Chairman, depending on the length of Mr. Reynolds' response.

The difficulty that I have with that, Mr. Reynolds, is that it is like the discussion on the voting rights case. I have to go through what you are saying in a very adversarial context.

When I read your statement, when we learn of the decision, we filed the brief acknowledging that it foreclosed the district court from granting our motion—you say that to the lawyers committee, and I have heard you say it before, that you will not contest this principle when circuits which have decided against you, you want to reserve your rights in the other circuits, but at least in the second, sixth, and eleventh you will not pursue this principle.

And then I find on very close questioning that you are pursuing it in specific cases albeit with a plausible reason, as you go through it. It leaves me really in doubt as to precisely what you are doing in a circuit like the second circuit, and it leaves me with the question in my mind as to an analysis of other representations made here, if there are some exceptions which would have to be analyzed very microscopically to see the real import of what you are saying.

Mr. **Reynolds**. Well, Senator, the only response I guess I can give you is that you have referred to testimony I gave on June 4, after some discussion that you and I had in advance, where I had indicated what I was willing to suggest as to be the appropriate course in these.

The *Buffalo* matter was something that had gone on before that time and was in court. All of those events had taken place before June 4. And what I was saying on June 4, when I came up here, based on conversations we had, is that I thought that it would be appropriate for us with regard to the *Stotts* initiative not to pursue in the circuits where the decisions had already come down, not to pursue litigation in those circuits, and in the others not to pick any fights. And we have had some discussions about that.

But the *Buffalo* series of events that you just went through were all matters that had taken place and were done well before that discussion.

The only other thing I would observe, Senator, is that I do not think it is quite accurate to suggest that there are a large number of cases that the Department of Justice has brought to test this issue. We have the case that we brought in Indianapolis. But the other cases are all cases that were in litigation by reason of other parties litigating. The Justice Department was either not a party to them and had sought to intervene at the Supreme Court level, or an appellate court level, or we came into the cases because the issue was joined and we were part of the decrees that were in question.

But this is not a situation where we have been going around the country filing lawsuits on these matters. We have the one in Indianapolis that I have referred to, and my testimony on June 4 to you was that with regard to how we would proceed in this in the days ahead, that as to the three circuits, we thought the issue was joined in those circuits and that those were binding on them at the present time. And we did not plan to go forward with litigation.

And as to the others, I was not going to pick a fight, but that if, indeed, we were drawn into court, we might at that time have to assert the legal position which I would only add is not mine alone. There are a lot of legal scholars who happen to agree with my interpretation of *Stotts* just as there are those that happen to disagree.

I think given the kind of controversy, or need for clarification on a case, that it is certainly something that we ought to seek to resolve. And my view is that the only place to resolve it is through the judicial system.

Senator SPECTER. Well, Mr. Reynolds, it is not what the legal scholars think in comparison to what the courts have held.

My point on the number of cases was that you had an ample basis for having the Supreme Court test it. And when I take a look at your 56-page memorandum, which was written after our private conversation and after your testimony on June 4, I would hope that you would have been more explicit as to what you were doing in observing the second circuit conclusion.

Mr. REYNOLDS. Well, Senator, I was trying to respond to some charges that had been made with regard to matters that had taken place before that time. And I will readily admit to you that that was the focus of what the response was. They had made some accusations and I thought it was incumbent upon us to explain what the events, in fact, were.

Senator SPECTER. Thank you, Mr. Chairman.

The CHAIRMAN. Senator Kennedy.

Senator MATHIAS. Senator Kennedy, before you proceed, may I ask the chairman what is the order of recognition on this side?

The CHAIRMAN. We alternate. Senator Kennedy has been one time.

Senator KENNEDY. Right.

The CHAIRMAN. And you had how many?

Senator MATHIAS. One. I am not challenging Senator Kennedy. I am just asking what the order will be for recognition.

The CHAIRMAN. We alternate one side to the other. We have been a little flexible this afternoon trying to accommodate those who had not been heard at all.

Senator BIDEN. Mr. Chairman, I think that order is fine. For the record, I have not asked any questions yet except to intervene on occasion, and I will wait until the very end to ask it all, but I just want you to know when I do, I have not had a first round yet. But I am prepared to wait until the end. I prefer to wait.

Senator KENNEDY. The Senator from Delaware as the ranking Member is entitled to do whatever he wants.

Senator BIDEN. No, I truly would prefer to wait.

Senator KENNEDY. All right. I do not expect even to use the full time, but there are a couple of areas that I would like to explore. Back to the *Bob Jones* case, Mr. Reynolds. When we talked about the *Bob Jones* case this morning, you said you only worked on the litigation and were not familiar with the policy decisions or press strategy or legislation. Is that a fair assessment or an accurate statement?

Mr. REYNOLDS. I was very definitely involved in the legislative activity following the filing of the brief in that short period of time after the brief and the time that we actually did craft the legislation.

Senator KENNEDY. That was a few days, was it not?

Mr. REYNOLDS. I believe that was in the timeframe of a relatively few days, but my——

Senator KENNEDY. Well, I think the press reports that I introduced this morning indicate that was between 3 and 4 days approximately.

Mr. REYNOLDS. That may be, Senator. I do not have a——

Senator KENNEDY. What happened after the filing of the briefs and prior to the introduction of the legislation? As I said this morning, from the press accounts, that was 3 to 4 days. I also indicated this morning that the Treasury report which was, at that time, the principal organ for stating the administration's position made no reference to the fact that the administration abhorred the concept of tax exemption support for segregated schools. There was no reference to that whatsoever.

So I am just wondering what happened in terms of the administration position. You indicated earlier in your testimony that the administration was always opposed to tax exemptions for segregated schools. Then as I understand, 4 days passed, and then you drafted the legislation.

What happened in that period of time? Why was there that delay?

Mr. REYNOLDS. Senator, as I recall it, there were a number of people in the administration who got together to fashion legislation and put together a bill to send up to both Houses.

That is a process that was not done overnight. There were people at the Treasury Department involved; people at the Justice Department involved, and it took I am not sure how many days. I know it was a short period of time, and my recollection is that, certainly, given what I am accustomed to in terms of the difficulties in crafting legislation and dealing with these sorts of complex issues in the context of putting together a meaningful bill, I thought that it was done in quite rapid-fire fashion.

Senator KENNEDY. Well, the point I am getting at is this: There was the filing of the brief with the statement of the position of the administration in opposition to the IRS regulations.

Are you suggesting now at this committee that at that very moment the administration was involved or had made the judgment to draft legislation to insure that you were going to have the legislative authority not to have to provide a tax exempt status for segregated universities?

Is that what you are telling this committee?

Mr. REYNOLDS. Senator, I have no knowledge at all about that. I was involved at the Justice Department side with the Justice Department activity, and Treasury was, I think, primarily doing the legislative side of it.

I know that we got called in to help on legislation, but I do not have any personal knowledge of exactly what the series of events were or the chronology of events were with regard to that.

My activity and responsibility were principally in connection with the Supreme Court filing and the Department of Justice's participation with respect to the matter that we filed on January 8.

Senator **Kennedy**. Well, then, the statement that you made in response to my earlier question in which you said, "Indeed, the President, at the time of the filing of the Bob Jones brief in the Supreme Court, offered legislation to the Congress seeking to make it clear and explicit that those schools that engage in discrimination would not be granted tax exempt status," is not technically really correct, is that?

There is certainly nothing that I have been able to find in the review of either the record of the Justice Department, the papers which you have submitted or in the press reports that anything happened until the political buzzsaw started to work.

And if I am wrong, if there are documents, if there are notes, if there are memoranda which indicate that at the time that you were filing the brief that you also were urging that there be legislation at that same time then please provide them.

But the evidence we have shows that the brief was filed, and then in the 3 to 4 days thereafter, as reported in the news reports, some action was taken in terms of the legislation. Thus, the statement which you made, "Indeed, the President at the time of the filing of Bob Jones brief offered legislation to the Congress * * *" is really not accurate, is it?

That is your statement on Tuesday, transcript page 64, in response to a question by Senator Hatch.

Question: "Mr. Reynolds, some people have claimed that you and the administration favored granting tax-exempt status to racially discriminatory private schools. Your position in the *Bob Jones* litigation case actually affects that. Would you comment on that particular criticism?"

You responded: "Well, Senator Hatch, neither I nor the administration ever favored granting tax-exempt status to racially discriminatory schools. Indeed, the President at the time of the filing of the *Bob Jones* brief in the Supreme Court offered legislation to the Congress seeking to have it made clear and explicit that those schools that engage in discrimination would not be granted tax-exempt status."

That is basically not an accurate statement.

Mr. **Reynolds**. I guess, read that way, that is correct. It was 4 days, I believe, after the brief that the President did, and when I said that, I did not have a specific recollection of exactly how many days we were talking about. It did seem to me that it was at the time. If I had been more accurate, I would have said around the time, and I do stand corrected on that, Senator.

What I meant to testify to was that, indeed, the legislation came down afterward, came down right around that time, and that at no point was it ever the view of the administration that tax-exempt status should be granted to schools of this kind, and I read Secretary MacNamara's testimony earlier today that reflected why the coincident of time was not on the same day but, indeed, was several days later.

Senator **Kennedy**. That is fine, but in the news report that we included in the record this morning, on the day the *Bob Jones* was filed, the Treasury spokesperson, as reported by Mr. Eucur of the Wall Street Journal, indicated that legislation on the tax status is not an issue that has been considered yet.

On another subject, you responded earlier to a question about the cases which you felt indicated a reflection of your positive position in the area of civil rights. I believe it was in response to a question that Senator Biden asked, and I would just like to focus your attention on the *Hishon* case.

You indicated that you had taken a position advocated by the civil rights groups and you cited that case where the Justice Department filed a brief in the Supreme Court urging that the court of appeals decision be overturned and taking the position that title VII covers a partnership decision.

Is it not a fact that in response to your staff's recommendation on the amicus participation in this case you wrote, "I am of the general view that the court of appeals decision is correct"?

Mr. REYNOLDS. I did, and then, after that, I reviewed it more thoroughly and I had a lengthy memorandum in which I said that I had come to the view that we ought to get into the court and we ought to make the argument that is reflected in our brief, and it is, indeed, the argument that the Supreme Court agreed with.

So you are absolutely right. When I first read the decision, that was my initial reaction, and on further review and analysis of the law in this area, I came out on the side that we argued in the Supreme Court and the side that the Supreme Court accepted.

Senator KENNEDY. Now, did you not also write in the same memoranda that you disagreed with the view of the EEOC that title VII covers the partnership decisions?

Mr. REYNOLDS. As a matter of fact, the EEOC and I did have a disagreement which continued because the EEOC's view was that in addition to employment decisions by the partnership under title VII which we both agreed were covered, the EEOC felt that if a partnership decision with respect to partners—that is, people coming from outside who were not employees—that that partnership decision would also be covered by title VII.

My view is that the statute and the legislative history does not cover that particular aspect, but it does cover any employment decisions of the partnership, and the Supreme Court only addressed that aspect which deals with the employment decisions.

So we did have a disagreement on that, but it was not something that was particularly relevant to the lawsuit in the Supreme Court briefs anyway.

Senator KENNEDY. Do you have the memoranda which reflects the changed view, your changed view?

Mr. REYNOLDS. I have a series.

Senator KENNEDY. I have that same series as well.

The memoranda that we have here dated February 27, 1983, indicate that you thought the decision dismissing the plaintiff's claim was the correct one, and if there is a subsequent memoranda that would indicate a change in your position, I think that that is very important.

If not, then I think it is difficult for us to find reason to think that those that were committed in the areas of civil rights ought to feel that your position on the *Hishon* case would be one that they should take much satisfaction from, since you, at least in the staff discussions, indicated that you believed the decision to dismiss plaintiff's claim was correct.

Mr. **Reynolds**. Senator, I do not have that memorandum here.

Senator **Kennedy**. Can you make that available to us? I think that is a pretty important one, the only one that we have at this time would indicate that you thought that the decision dismissing the plaintiff's case was correct.

Then you went in and took a different position. You are using that as a reason why the civil rights groups ought to have a sense of confidence in you when actually in discussions with your staff you were arguing a different position.

I just think that we ought to have that clarified, and if you have this position which you have articulated here available to us in some written form, then I would certainly welcome it. If not, I would think that we would have to go with the last memorandum.

The **Chairman**. I believe your time is up.

[Memorandum follows:]

WBR:BKL:JWC:bj
DJ 170-19-136
T.4/19/83

25 APR [illegible]

MEMORANDUM FOR THE SOLICITOR GENERAL

Re: Amicus participation in Hishon v.
King & Spalding, No. 82-940, O.T. 1982

We recommend amicus participation by the United States in this case.

STATUS

The court of appeals issued its decision in June 1982.[1/] The Supreme Court granted the plaintiff's petition for certiorari on January 24, 1983. The petitioner's brief must be filed by May 9. No further extensions will be granted. The respondent's brief must be filed within 30 days of its receipt of petitioner's brief.

The date for filing an amicus curiae brief supporting the petitioner or neither side is May 9. An amicus curiae brief supporting the respondent must be filed within the time allowed for the filing of respondent's brief.

QUESTIONS PRESENTED

1. Whether a partner in a large law firm is an "employee" for purposes of Title VII of the Civil Rights Act of 1964.

2. Whether consideration of petitioner for advancement to partner in a law firm was a "term, condition or privilege" of her employment or an "employment opportunity" within the meaning of Title VII.

3. Whether the discharge of petitioner under the firm's "up or out" policy violated Title VII.

[1/] 678 F.2d 1022 (11th Cir.), Pet. App. A-1.

bcc: Records
Chrono
✓Reynolds
Turner
Cooper
Landsberg
Silver
Rose
Clute
File

INTEREST OF THE UNITED STATES

The Attorney General and the EEOC share Title VII enforcement responsibilities. The broader issues raised by this case are of great importance to both the Attorney General and the EEOC because they frequently arise in Title VII suits.2/ The Court will probably establish general principles for determining who is an employee, what constitutes an employment relationship and what is meant by "terms, conditions, or privileges of employment" as used in Section 703(a)(1) of Title VII. The briefs filed at the petition stage do not reflect our views on the issues presented.

We have had the opportunity to review EEOC's memorandum recommending the filing of an amicus brief. We agree with the EEOC that amicus participation is warranted and that petitioner stated a valid Title VII claim by alleging that fair consideration for partnership constituted, inter alia, a term of her employment as an associate and that this term of employment was discriminatorily denied on account of sex. However, we do not agree with EEOC's suggestions that the court of appeals applied the wrong legal standard in deciding whether partners are employees and that the case should be remanded for further discovery on this issue. Nor do we feel, as the EEOC does, that petitioner's claim of discriminatory discharge has merit.

STATEMENT

The district court granted respondent's motion to dismiss the suit; the court held that it lacked subject-matter jurisdiction.

2/ The specific issues presented by the facts of this case will probably arise with greater frequency in Title VII suits against private rather than public employers. They might also be presented in suits arising under Executive Order 11246 if, for example, the government entered a contract with a private law partnership.

1. The facts alleged by petitioner or stated by the courts 3/ may be summarized as follows: King & Spalding hired petitioner as an associate in 1972 (Pet. 3). The firm included 50 partners, 50 associates and 50 other employees (ibid.). At the time petitioner was hired, the firm employed one other female attorney, a "permanent associate" (Pet. 4). The firm promised petitioner that, after satisfactory completion of six years as an associate, she would be considered for partnership on a nondiscriminatory basis (ibid.).

In 1978, the firm told petitioner that she had been considered for partnership, but had not been selected (678 F.2d at 1024, Pet. App. A-2 to A-3). She asked for reconsideration. In 1979, she was again informed that she had not been selected (ibid.). Under the firm's "up or out policy," this meant termination of petitioner's employment as an associate (Pet. 4). Petitioner alleges that the denial of partnership and the termination of her employment were due to sex discrimination (ibid.).

2. Petitioner's suit is based on Title VII. She asserts three theories of liability: First, a large partnership such as respondent is a legal entity separate from its partners and should be considered the "employer" of the partners (Pet. 12). Second, fair consideration for promotion to partner was a "term, condition or privilege" of petitioner's employment (see 42 U.S.C. 2000e-2(a)(1)) or an "employment opportunity" (see 42 U.S.C. 2000e-2(a)(2)) (Pet. 14). Third, the termination of petitioner's employment as an associate was the direct result of sex discrimination and therefore a violation of Title VII (see 42 U.S.C. 2000e-2(a)(2)) (Pet. 15).

3/ The district court limited discovery to the "jurisdictional" issue of Title VII coverage (678 F.2d at 1025, Pet. App. A-5). The district court denied petitioner's request for discovery into such matters as the amount of capital contribution required of new partners in King & Spalding and the division of partnership profits among the classes of partners (Pet. App. A-19). The information provided by respondent, including an edited version of its partnership agreement, was placed under seal (ibid.) Also, the court of appeals placed the appellate briefs under seal (ibid.). The Supreme Court released the record after the court of appeals denied motions to unseal it. We have reviewed the record and the court of appeals briefs.

3. The district court concluded that Title VII does not cover a partnership's selection of partners (Pet. App. A-24 to A-25). According to the court, if Title VII were to apply to such selection, there would be a conflict between the statute and the partners' constitutional right of association (ibid.).

The court of appeals affirmed the dismissal of petitioner's suit (678 F.2d at 1024, Pet. App. A-2). Judge Tjoflat dissented (678 F.2d at 1030, Pet. App. A-14).

The majority stressed that "voluntary association" is the essence of a partnership (672 F.2d at 1024, Pet. App. A-2). They stated their basic conclusion in the following way:

> Even under the most liberal reading we cannot find the requisite congressional intent to permit Title VII's intervention into matters of voluntary association. We can conceive no set of facts which would entitle her [the plaintiff] to relief under Title VII with respect to partnership decisions.

678 F.2d at 1026; Pet. App. A-6.

The majority rejected the notion that King & Spalding should be treated as a corporation and that, for Title VII purposes, its partners are "employees" (678 F.2d at 1026-1028, Pet. App. A-7 to A-10). Based on the terms of Title VII, the lack of pertinent legislative history, the case law, and the particular circumstances, the majority concluded that the firm is a partnership and its partners own the partnership and are not its employees.

The court turned to the issue of "term or condition" or "employment opportunity" and stated:

> We have no quarrel with the premise that an "opportunity" can include promotion to a position beyond that of an "employee" covered by Title VII. But, once again, we decline to extend the meaning of "employment opportunities" beyond its intended context by encroaching upon individuals' decisions to voluntarily associate in a business partnership.

678 F.2d at 1028, Pet. App. A-11. The court reiterated its view that: "Decisions as to who will be partners are not within the protection of Title VII" (678 F.2d at 1029, Pet. App. A-13).

Finally, the majority rejected petitioner's assertion that the "up or out" termination of her employment violated Title VII. According to the majority:

> While discriminatory termination alone may have stated a cause of action under Title VII for an unlawful discharge, * * * when the termination is a result of the partnership decision, it loses its separate identity and must fall prey to the same ill-fate as her original attempt to apply Title VII to partnership decisions.

678 F.2d at 1029, Pet. App. A-14.

In his dissent, Judge Tjoflat stated:

> While I agree that Title VII would not apply to the discrete decision whether to take on a new partner, when the partnership decision inextricably and inevitably is a decision whether to terminate employment, I would hold that Title VII applies.

678 F.2d at 1030, Pet. App. A-16 (footnote omitted). He said that the judgment of dismissal should be reversed and the case should be remanded.

4. In its brief in opposition to the petition for certiorari (p. 4), respondent stresses that Title VII applies only to employment and argues that it does not extend to relationships among partners who are owners and thus employers.

DISCUSSION

1. Title VII was intended to prohibit discrimination in employment. It makes it an unlawful employment practice for an employer to "* * *discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin" (703(a)(1)) or "to deprive any individual of employment opportunities" for the same prohibited reasons (703(a)(2)) (emphases added). An individual cannot invoke Title VII unless that person seeks, has, or has had employment relationship with an employer. Cobb v. Sun Papers, Inc., 673 F.2d 337 (11th Cir. 1982); Spirides v. Reinhardt, 613 F.2d 826 (D.C. Cir. 1979).

Petitioner argues that King and Spalding's partners are "employees" of the partnership and that election to partnership should be regarded as a promotion or "employment opportunity" within the meaning of Section 703(a)(2) (Pet. 12-14). She reasons that the discriminatory denial of a promotion to partner violates Title VII.

In our view the court of appeals correctly ruled that partners are not "employees" of the partnership and that therefore selection for partnership cannot constitute an "employment opportunity" on the theory that it is a promotion. King and Spalding's partners do not have an employment relationship with the law firm and hence cannot be considered its employees. They are the joint owners of that business venture. Partnership decisions are properly characterized as decisions on how to allocate ownership interests in a business venture and not as promotions. These decisions are subject to judicial review pursuant to Title VII when and if the partnership makes consideration for partnership a term of an associate's employment (see point 2 _infra_). Unless the Title VII claim arises from such an employment relationship, partnership decisions should be considered business decisions beyond the reach of Title VII.

The concept of employment relationship is best understood by reference to a hypothetical situation. Let us assume that an individual is the sole owner and manager of an incorporated business which employs twenty persons. The owner has an employment relationship with the employees. The owner is their employer and Title VII could reach any decisions which directly affect their status as employees. For example, if the owner decided to share ownership with the employees by compensating them with stock in the company, the owner would not be free to restrict the stock offer to employees on the basis of national origin. _Cf._ _Bonilla_ v. _Oakland Scavenger Co._, 30 EPD ¶33,128 (9th Cir. 1982). However, it is obvious that not every business decision the owner makes can provide the basis for a Title VII claim. If the owner decides to sell part of the business to another person who is unconnected with the business, Title VII would not limit the owner's freedom to choose a purchaser based on race or sex or other prohibited criteria because the statute does not purport to apply outside the context of an employment relationship.

The King and Spalding partners are like our hypothetical business owner in several important respects. They own the business and they employ others (clericals and associates) to assist them in the operation of the business. Title VII applies to partnerships 4/ because Congress recognized that an employer--employee relationship exists between those individuals the partnership hires, pays, promotes, supervises and terminates-its employees--and the partnership. But it does not follow that an employment relationship exists between the partnership and its partners. See, *e.g.*, *Burke* v. *Friedman*, 556 F.2d 867 (7th Cir. 1977).

Title VII recognizes a partnership as a separate separate legal entity making it possible to argue that a "relationship" exists between the partners and the partnership. However, the central issue is whether this is an employment relationship. We submit that it is not. A partnership's decision to admit to partnership someone who is unconnected with the firm is analogous to the business owner's decision to sell part of the business to another person. (We discuss *infra* the acquisition of partnership interests by employees.) When a new partner joins a law firm that person acquires a joint ownership interest in the business. A King and Spalding partnership interest entitles the new partner to a share of the firm's profits, losses and assets and to participate in the management of the firm (King and Spalding Partnership Agreement (R. 161-172)). It renders the new partner liable to third parties for the actions of the partnership (Ga. Code §75-103)and for the fraudulent actions of another partner in matters relating to the partnership (§75-307). The new partner "purchases" that joint interest by a commitment to share any profits that result from the fruits of the new partner's labor with the other partners in accordance with the terms of the partnership agreement. 5/

Petitioner argues that the court of appeals did not apply the correct legal standard, "economic reality," in deciding whether partners are employees but instead employed a narrower test based on the common-law definition of partnership (Pet. 18-21). The court of

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4/ Title VII defines "employee" as "an individual employed by an employer * * *" (Section 701(f), 42 U.S.C. 2000e(f)) and "employer" as "a person engaged in an industry affecting commerce who has fifteen or more employees * * *" (Section 701(b), 42 U.S.C. 2000e(b)). The definition of "person" expressly includes "partnerships" (Section 701(a), 42 U.S.C. 2000e(a)).

5/ A King and Spalding partner also makes a capital contribution to the partnership (R. 162). Contrary to petitioner's suggestion (Pet. 13, 19), the fact that a partner "purchases" a partnership interest primarily by providing labor rather than cash is not determinative of whether that person has an employment relationship with the law firm. Independent contractors provide labor to businesses without having an employment relationship with the business they work for. See, *Spirides*, *supra*; *Cobb*, *supra*.

appeals was cognizant of the case law on which standard to use in making such determinations and it chose a broad standard which included consideration of the economic realities as well as traditional partnership principles (Pet. App. A-8-A-10). The economic reality test, coupled with a consideration of common law principles, has been the test most frequently used in deciding whether an individual who works for an employer is an employee or independent contractor for purposes of Title VII. See, e.g., Spirides, supra; Cobb, supra; Lutcher v. Musicians Local 47, 633 F.2d 880 (9th Cir. 1980). The economic reality standard is not directly applicable in a case such as this where the question is whether partners are more properly classified as employers or employees. To the extent that the court of appeals placed greater reliance on partnership principles than on "economic realities" it was proper to do so because these principles are more compatible with the ordinary meaning of employer.6/ See Chemical Workers v. Pittsburg Glass, 404 U.S. 157 (1971)

We have found no Title VII cases (other than Hishon) or Fair Labor Standard Act decisions which purport to apply the economic reality standard in deciding whether a partner is an employee of a partnership. 7/ Goldberg v. Whitaker House Cooperative Inc., 366 U.S. 28 (1961) considered whether individuals who possessed an "ownership" interest in the business were employees. In that case the Court held that a cooperative was an "employer" within the meaning of the Fair Labor Standards Act and that the members of the cooperative, who had a paid a $3 membership fee for a non-transferable certificate, were its employees. All of the members were home workers who were subject to expulsion by the board of directors of

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6/ Several common law criteria are considered under the "economic reality" test. See United States v. Silk, 331 U.S. 704, 716 (1947) One principal difference is that an employer's right to control an individual who provides services is of greater importance under common law principles than whether control is actually exercised. See Cody v. Ribicoff, 289 F.2d 394 (8th Cir. 1961) ("associate" physician of medical partnership is an employee for purposes of Social Security Act where agreement with partnership gives it the right to control physician's work). Also greater weight is given to whether the person claiming to be an employee is economically dependent on the employer under the economic reality test.

7/ This claim was raised in two FSLA cases but neither case contains a useful discussion of the issue. Brennan v. Partida, 492 F.2d 707, 710, n.2 (5th Cir. 1974); Voyles v. Murray, 297 F. Supp. 1288 (N.D. Tex. 1969).

the cooperative if at any time they violated board rules and regulations or if their work was substandard. The legislative history of the Fair Labor Standards Act reflected a clear intention to apply minimum wage rates to home workers. In reaching its decision the Court observed "[t]here is nothing inherently inconsistent between the coexistence of a proprietary interest and an employment relationship. If members of a trade union bought stock in their corporate employer, they would not cease to be employees within the conception of this Act." (366 U.S. at 32).

Petitioner suggests that the court of appeals decision in this case is inconsistent with Goldberg (Pet. 13, 19-20). We believe Goldberg is clearly distinguishable. Petitioner makes no allegation that King and Spalding partners are like the members of the cooperative in Goldberg who were subject to the complete control of the board of directors. King and Spalding partners are entitled to control the business and therefore are more like the cooperative's board of directors than its employees. There is no indication in the petition or the partnership agreement that the King and Spalding partnership is a sham. See Commissioner v. Tower, 327 U.S. 280 (1946) ("family partnership" a sham used to evade federal income tax). The court of appeals found, after reviewing the partnership agreement, that it did "nothing more than clarify the internal structure of the firm" (Pet. App. A-7). Therefore, we believe the court of appeals affirmance of the district court's finding that partners are not employees was proper.

2. The most compelling argument supporting petitioner's claim is that King and Spalding followed the practice of considering associates for partnership. Indeed, the pleadings reflect that all associates are told that they will be considered for partner. Thus, such consideration is a "term", "condition" or "privilege" (Sec. 703 (a)(1)) of employment as an associate and is an employment opportunity (Sec. 703(a)(2)). We must assume for the purposes of this case that petitioner was denied partnership because of her sex while male associates received non-discriminatory consideration for partnership as she alleges in her complaint.8/

8/ Petitioner claims the partnership applied different standards to male associates than it did to her (R. 10, ¶17(H)) and "to the extent lawful and necessary criteria were used" they were applied differently because of her sex (R. 9, ¶17(f)). Hypothetically the facts could show that male associates were evaluated on the basis of their performance over 5 or 6 years whereas the partners decided not to undertake such an evaluation of petitioner's work performance on the ground that the firm was not ready to have a female partner.

While the court of appeals accepted the concept that one of the terms of petitioner's employment could be "promotion to a position beyond that of an 'employee' covered by Title VII" it nonetheless concluded that petitioner's second theory did not state a claim for relief because, if accepted, it would encroach upon "individual's decisions to voluntarily associate in a business partnership" (Pet. App. A-11).

The fact that treating consideration of an associate's selection for partner as a "term" of employment encroaches on some partnership decisions does not warrant ignoring the plain language of Title VII. Section 703(a)(1) of Title VII provides that it is an unlawful employment practice for an employer "otherwise to discriminate against any individual with respect to his * * * terms, conditions, or privileges of employment, because of such individual's * * * sex * * *." For reasons set forth *supra*, it is clear that an employer-employee relationship exists between the partnership and its associates. *Lucido* v. *Cravath, Swaine & Moore*, 425 F. Supp. 123 (S.D. N.Y. 1977). Courts are obligated to give Title VII's language its "ordinary meaning" absent a clear expression of legislative intent to the contrary (*American Tobacco Co.* v. *Patterson*, 102 S.Ct. 1534, 1537 (1982)) and to "avoid interpretations of Title VII that deprive victims of discrimination of a remedy, without clear congressional mandate." *County of Washington* v. *Gunther*, 452 U.S. 161, 178 (1981). Although the words "term", "condition" and "privilege" encompass traditional employee benefits such as working conditions, retirement plans and seniority rights, it would be contrary to congressional intent to limit their application to these categories of interests because Congress intentionally chose more inclusive language. *Rogers* v. *EEOC*, 454 F.2d 234, 238 (5th Cir. 1971), cert. denied. 406 U.S. 957; see *County of Washington* v. *Gunther*, *supra*, 452 U.S. at 178. On those occasions when courts have been asked to consider whether a non-traditional benefit is encompassed by this language they have declined to define Title VII's reach narrowly. 9/

9/ In *Pettway* v. *American Cast Iron Co.* 494 F.2d 211, 264-267 (5th Cir. 1974), the court of appeals affirmed with modifications a district court order prescribing the method of election for the company's Board of Operatives. The district court had held that the company had discriminatorily denied blacks the opportunity to be elected to this Board and that that opportunity constituted a valuable term, condition or privilege of employment because Board members acted as trustees of stock which was collectively owned by the employees and advised the Board of Management on employee relations. *Cf.* *Bonilla* v. *Oakland Scavenger Co.*, 697 F.2d 1297 (9th Cir. 1982) (court of appeals dicta indicates that the right of employees to purchase stock in the company might be the term, condition or privilege of employment which must be conferred on a non-discriminatory basis).

At all events, consideration for partner was admittedly one of the "employment opportunities" afforded all associates in this case (R. 26, ¶8(b)). Where, as here, "fair and equal" consideration for partnership is an indicia of employment by the firm, and associates are not only being considered, but also being taken into the partnership based, at least in part, on their performance during the employment relationship with the firm, Title VII guarantees non-discrimination in the firm's selection process. The firm must therefore be held accountable to the non-discrimination requirement of Section 703(a) in undertaking that consideration. Petitioner claims that male associates were selected for partnership after 5 years while she was excluded because of her sex, notwithstanding the fact that she was as well qualified as the male associates who were chosen. This allegation suffices to state a claim under Title VII. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); United Airlines, Inc. v. Evans, 431 U.S. 553 (1977).[10/]

In so concluding, it is important to keep in mind that a law partnership need not select any of its partners from the associate ranks, but once it chooses to do so, consideration of its associates must proceed on a race-neutral and sex-neutral basis under Title VII. To the extent it chooses its partners from outside the associate ranks, Title VII has no application any more than it would if a decision were made to exclude women from among the initial group of partners at the time of the partnership's formation.

3. Petitioner's final argument is that she was discharged as a direct result of the discriminatory decision not to promote her to partner (Pet. 16). Judge Tjoflat dissented on the ground that this allegation stated a claim for relief.

Petitioner's complaint fails to set forth any facts which, if proven, would state a claim for discriminatory discharge. She merely alleges that she was discriminatorily discharged (R. 8, ¶15).

[10/] The fact that petitioner would no longer have an employment relationship with the firm if she became a partner does not vitiate any claims which arise by virtue of her previous employment relationship with the law firm. The court of appeals accepted the notion that Title VII protects an employee's interest in promotion to a position not itself covered by the Act (Pet. App. A-11). Former employees have a right to non-discrimination in the allocation of retirement benefits. Los Angeles Department of Water and Power v. Manhart, 435 U.S. 702 (1978); see also, Shehadeh v. Chesapeake & Potomac Tel. Co., 595 F.2d 711 (D.C. Cir. 1978) (discharged employee states valid Title VII claim against former employer by alleging she was given adverse references on account of her sex).

The complaint taken alone cannot suffice to state a claim. McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976). King and Spalding's answer links petitioner's discharge to its up or out policy whereby all associates who do not make partner must leave the firm within a reasonable period of time. However, this merely shows that her discharge was the result of the decision not to make her a partner. King and Spalding further stated that all associates who failed to make partner were treated similarly. There is no allegation to the contrary in the complaint. Under these circumstances the decision not to make petitioner a partner is the only employment practice which gives rise to a valid Title VII claim. See Delaware State College v. Ricks, 449 U.S. 250 (1980); Chardon v. Fernandez, 454 U.S. 6 (1981).

CONCLUSION

We agree with the EEOC that an amicus brief is warranted in this case but we have differences of opinion as to how to treat certain of the issues. The May 9 filing deadline makes it imperative that the position of the government be established soon. We are therefore proceeding to draft a brief along the lines discussed in this memorandum for review and comment.

Wm. Bradford Reynolds
Assistant Attorney General
Civil Rights Division

cc: Attorney General
Deputy Attorney General
General Counsel, EEOC

The CHAIRMAN. I have been requested to have a 5-minute recess. You have been here 3 hours. So we will take a 5-minute recess and Senator Mathias will be the first Senator to question you after the recess.

[Whereupon, a short recess was taken.]

The CHAIRMAN. The committee will come to order.

The distinguished Senator from Maryland, the ranking member of this committee.

Senator MATHIAS. Thank you, Mr. Chairman.

I think I can be very brief. Mr. Reynolds, I think the point at which we broke off 2 weeks ago involved the *Jaffree* case and the accompanying memorandum. Since that time, I have seen what I believe to be another *Jaffree* memorandum.

It was a memorandum from you addressed to Rex E. Lee, Solicitor General. It concludes with this statement:

> I would only add that there is, in my view, no downside to government participation in *Jaffree.* If the court agrees to hear the case on its merits in response to our brief, we will certainly have made a great stride forward. If it refuses to note probable jurisdiction, we will then have provided clear evidence of the need for a constitutional amendment to restore voluntary prayer to public schools. The President will be well served in either case.

That quote leads me to pose a question to you that I asked Attorney General Meese. Before that, I asked the same question to Attorney General Griffin Bell.

Who do you perceive to be your client?

Mr. REYNOLDS. The United States is the client, Senator.

Senator MATHIAS. What do you mean by "the United States?" Do you mean the President? Do you mean the people? Do you mean the Department of Justice? What is your vision? What I am reaching for is your vision of who you represent as one of the senior officials of the Department of Justice.

Mr. REYNOLDS. Senator, I represent the United States as one of the lawyers in the Department of Justice. The head of the executive branch of the United States is obviously the President who sets the policy, and I am supposed to perform in my legal capacity to advance in court the policies in accordance with what the law requires.

Senator MATHIAS. When I asked Attorney General Meese and Attorney General Bell that question, my recollection is that we finally concluded that the Attorney General, and I would assume that you stand in the shoes of the Attorney General, is not the President's lawyer. He is the lawyer for the people of the United States. He is the lawyer to whom the people of the United States look.

I just wanted to see what your perspective was on that question.

Mr. REYNOLDS. My view is that the Department of Justice represents the United States in all of our activity and that certainly means that we represent all the people, and insure that all the people are dealt with justly and fairly under the laws of the United States.

Senator MATHIAS. My view is that the Attorney General has to be the people's lawyer in the sense that he is the chief law enforcement officer of the country, to whom the people look for enforcement of the law.

The duty of advocacy runs to the people rather than to the Senate, the House of Representatives, the President or to any other branch of the government. That is a matter of perspective, and I just thought we might discuss it.

Let me turn to another case which you brought up in the first hearing. You brought it up in response to a question that appears in the transcript page 197. I am trespassing on Senator Biden's territory because he raised the question.

On that page he said, "Are there any close controversial cases where the result was that the civil rights groups were happy with your decision?" Skipping down some lines, he then, said, "Name me a close call where those folks thought, 'Doggone that Bradford Reynolds, he got it right this time.'"

That is pure Joe Biden, assuming the reporter was accurate. Your response appears on the next page, and again I just pick out one line.

You said, "Havens Realty where we opened up the standing of testers in title VIII housing discrimination cases where we went in the case of opposition to most of the courts, the Supreme Court accepted our argument is another one that I would say the civil rights groups ought to be extremely happy with." Do you recall that?

Mr. REYNOLDS. I said that, Senator. That is right.

Senator MATHIAS. What was the nature of the Department's participation in the *Havens* case?

Mr. REYNOLDS. The Department participated as an amicus in the *Havens* case.

Senator MATHIAS. The difficulty with that as an example is that you had actually opposed participation as an amicus.

Mr. REYNOLDS. Initially I had opposed participation as an amicus because I thought that there were jurisprudential reasons relating to mootness and statute of limitations concerns that did not make this the most appropriate case to advance that issue.

But I did agree that the standing question was one that should be resolved in the way that the court did and in favor of standing for the testers and, indeed, when we filed the brief, I signed the brief in the court because I felt that that was the position that we should be taking, and indeed, was the position we did take.

But you are absolutely right; I had reservations as did a number of the lawyers in the Department with regard to some of the procedural questions that lurked in the *Havens* case.

Senator MATHIAS. Your reservations were expressed in at least two memorandums, two that have come to my attention just this afternoon. One is a memorandum addressed to Jessica Silver, Deputy Chief, Appellate Section of the Civil Rights Division. I do not see the date, but the subject is the *Havens Realty* v. *Coleman*.

The other is a memorandum for the Solicitor General, dated the 10th of August 1981. In the Jessica Silver memorandum, you argued first that there was a strong mootness argument. You stated that, All we could realistically hope to gain by Supreme Court review is a Fair Housing Act precedent which standing alone is a questionable excuse at best for seeking amicus participation.

Second, you argued that wisdom counsels against Government participation. Remote testers who can show neither community ties nor individual interest in the apartment complex advertised and who fail to assert a colorable claim of individual injury probably should not have standing.

Third, you argued that, "the fourth circuit standing argument on behalf of Hume is sheer sophistry. If amicus participation is warranted at all in this case, it would, in my judgment, be most appropriate in support of a challenge to this part of the opinion.

"Fourth, the court of appeals application of the continuing violation theory to permit the claims of Coleman, Willis, and Hume to survive, while perhaps defensible, calls upon the Supreme Court to test this theory in perhaps the worst factual pattern imaginable."

You conclude, "My preference is to stay on the sidelines and quietly watch."

There are four reasons to stay out of the case. Can you recall why you adopted this position and adopted those four reasons?

Mr. REYNOLDS. Senator, I do not have any specific recollection. I know that this was an issue that came up early in my tenure, that my initial reaction was that we should stay out of the case, and I have problems with a standing issue that on further examination and reflection and discussion with my staff and looking at the statute I came to a different conclusion; that is reflected in my August 10 memorandum where, indeed, I continued to harbor the same concerns on the procedural grounds but I was satisfied that the standing issue, indeed, was one that had been decided correctly, and that they ought to have standing, although it related to a provision in the Fair Housing Act that gave to any person the right not to be provided fraudulent or false information.

I thought that was, indeed, an appropriate basis for standing of testers and I had been satisfied that my initial impressions with regard to that issue were wrongly based and, on an analysis of the entire matter, I therefore reflected that in the subsequent memorandum.

Senator MATHIAS. But in your 10th of August memorandum to the Solicitor General you also say, "I recommend against participation by the United States." You take the same view.

Mr. REYNOLDS. I did say that, and the Solicitor General authorized it and I participated in writing the brief that was filed with the court. Again, my concern was not——

Senator MATHIAS. In other words, the Solicitor General took the other view and he prevailed?

Mr. REYNOLDS. He took the view that we ought to go in because he was not as concerned about the procedural questions on mootness and statute of limitations that had bothered me about the case, and therefore, he thought that we ought to go in and argue the testing issue or the standing issue and he assigned that matter to me and I worked on the brief and we filed it and we did prevail.

Senator MATHIAS. Well, the only difficulty I have with that is that you were responding to Senator Biden's question with respect to something with which the civil rights groups ought to be extremely happy.

Now, they may be happy with the result, but my concern is that the result really was what you originally wanted.

Mr. REYNOLDS. It was——

Senator BIDEN. Will the Senator yield?

Mr. **Reynolds**. I just want to acknowledge it was the opposite from the way I started, and that happens a lot of times, Senator. I have to admit, I cannot come to these issues and have all the answers and all the right answers on all of these complex legal issues.

I start from one place, and we have a free and open exchange of the legal considerations that do, indeed, inhere. I listened to the arguments and my mind has been changed on an awful lot of occasions in a number of ways.

Havens is a very good example of exactly how that process works and works effectively, and when the brief was written, I was one who participated in it. We signed the brief, and we did win the case in the court.

Senator **Mathias**. I yield.

Senator **Biden**. Mr. Reynolds, then to make sure I understand it, you believe that the course of action finally taken by the Department was the proper course, that you believed strongly in the position taken by the Department, ultimately taken by the Department?

Mr. **Reynolds**. That is right. I agree with it, and I worked on the brief and signed the brief.

Senator **Biden**. At what point did you make this change in your—I do not mean date. I mean, you know, were you arguing about it while the brief was written?

Mr. **Reynolds**. I do not really recall, Senator. I do recall that there were a number of discussions that involved myself and my staff and also the general counsel of HUD. We talked about this issue back and forth and I did start at one place and, indeed, with regard to my concerns on the procedural issues, I stayed pretty much at that spot, but on the fundamental standing question, I did come to the conclusion that it was the right position to be taking.

When the Solicitor General felt that, notwithstanding the procedural concerns we ought to go into the case, I certainly did have no problem at all working on the brief and filing the brief.

Senator **Biden**. Thank you.

Senator **Mathias**. Well, in all fairness, this is really a case where Rex Lee had it right.

Mr. **Reynolds**. I think that is right. I agreed with Rex Lee on the standing issue when he made that decision. As I say, my only disagreement was that I thought this was a very difficult case from a mootness standpoint and from the standpoint of where there had been a continuing violation, and it was for those reasons that I had reservations about going ahead and participating as amicus, but certainly Rex Lee was the one who had that call to make and he made it, and I agreed that when we go in that we ought to argue that the testers did have standing.

Senator **Mathias**. Thank you, Mr. Chairman.

The **Chairman**. Thank you, Senator.

Senator **Biden**. Mr. Chairman, may I ask some questions?

The **Chairman**. The distinguished Senator from Delaware.

Senator **Biden**. Thank you very much.

Mr. Reynolds, I am not as good at this as Senator Hatch is, and that is redefining what we have done, but I want to make it clear at the outset of my first series of questions that, as far as I am concerned, this hearing is not about quotas, not about busing, and not about integrity.

With regard to quotas, Senators Specter, Heflin, and Simon asked about the *Memphis Firefighters* case, but they asked about it in terms of whether or not the law was being upheld, not whether quotas were good or bad.

And busing, to the best of my knowledge, has been mentioned by no Senator. I do not know of any Senator that has even mentioned busing. It was mentioned by a couple of witnesses who raised the question who disagree with you on your position on busing.

The focus has been on the Voting Rights Act, the right upon which all others rights depend. It has been about the rights of the handicapped, tax-exempt status for discriminatory schools, fair housing, and how vigorously you enforce civil rights laws generally. And I would like to pursue the last portion of that focus that we have been with for, in my estimation—and I have been here the better part of the 3 days, those 3 days, and I would like to do it by returning to the *Major* v. *Treen* case that we examined in some detail last week.

During our questions and answers session, we focused on whether you were aware of certain evidence. I can hold while you want to get that together so I do not mislead you in any way.

[Pause.]

Senator BIDEN. Do you have what you need?

Mr. REYNOLDS. Well, I am not sure, but I will try.

Senator BIDEN. Well, tell me as we go along. During our question and answer sessions, we focused on whether you are aware of certain evidence or certain allegations of the existence of evidence of a discriminatory intent.

As you may recall, we discussed, for example, the exclusion of black legislators from the so-called basement meeting. We discussed the allegation that one important legislator said, quote, "We do not need another nigger big shot," end of quote.

We discussed the way the district line, in the words of the court, quote, "slices through wards heavily populated by blacks, while leaving white wards intact."

And now I would like to ask you to put that case in its legal context. I would like to get a better idea of how you made your decision and possibly get an idea how you generally decide close cases in the voting rights area by looking at how you applied section 5 of the Voting Rights Act in this case.

Specifically, I would like to ask you about the burden of proof in section 5, and I would first like to review some of the history behind section 5 as I believe it to be.

In 1966, the Supreme Court upheld as constitutional various sections of the Voting Rights Act including section 5 in *South Carolina* v. *Katzenbach*. In reaching that conclusion, the Court found that Congress in enacting the Voting Rights Act had decided, quote, "to shift the advantage of time and inertia from the perpetrators of the evil to its victims," end of quote, in response to a history of, quote, "unremitting and ingenious defiance of the Constitution," end of quote.

In later Supreme Court decisions, the placing of the burden on the submitting jurisdiction has been reiterated. In *McDaniel* v.

Sanchez in 1981, for example, the Court stated that, quote, "The covered jurisdiction has the burden of demonstrating that the district changes are not motivated by discriminatory purpose and will not have an adverse impact on minority voters," end of quote.

I know you know all this but I want it for the record.

"The placement of the burden of proof was reemphasized more recently in 1984 in *McCann* v. *Lybrand* where the Court stated, quote, "The preclearance process is, by design, a stringent one. It is predicated on the congressional finding that there is a risk that the covered jurisdiction may attempt to circumvent the protections afforded by the act. The burden of proof, the risk of nonpersuasion, is placed upon the covered jurisdiction," end of quote.

These Court decisions, I think, make it quite clear to the Attorney General which way Congress wanted him to lean in close cases, and that is in the direction of objecting rather than leaning in the direction of preclearing.

The Justice Department's regulations for administering section 5 are a bit more specific on this point. Those regulations state at 28 CFR section 51.39(e) that the burden of proof on the submitting authority when it submits a change to the Attorney General, quote, "is the same as it would be if the change was the subject of declaratory action in the U.S. District Court for the District of Columbia," end of quote, which means the burden is on the submitting jurisdiction.

The regulation continues, and I quote, "Therefore, if the evidence as to the purpose or effect of a change is conflicting and the Attorney General is unable to determine that the submitting jurisdiction does not have the prohibitive purpose or effect, an objection shall be," not may be, but shall be, "interposed to the change," end of quote.

I have several questions. In the *Louisiana* redistricting case, is it correct that Louisiana has the burden of proving the absence of discriminatory intent?

Mr. Reynolds. That is correct.

Senator Biden. And did Louisiana have to prove absence of discriminatory intent by a preponderance of the evidence?

Mr. Reynolds. Yes, it would have to do that.

Senator Biden. Now, would you, in your own words, explain how you interpret what is meant by the regulation where it states, "If the evidence as to the purpose or effect of a change is conflicting and the Attorney General is unable to determine that the submitting change does not have the prohibitive purpose or effect an objection shall be interposed"?

How do you interpret that section?

Mr. Reynolds. I am not sure if I can state it better in my own words. I think that is precisely the way that the act operates, that, indeed, if there is conflicting testimony and the Assistant Attorney General is unable to resolve the intent question in terms of there being no discriminatory intent, then there has to be an objection entered.

Senator Biden. How much conflicting evidence is necessary for you to be unable to determine whether or not there is a prohibitive intent or effect?

Mr. **Reynolds**. I am not sure I understand the question. If it is conflicting, I think that that answers—I am afraid I may be missing something. If there is conflicting testimony and I am unable to make the determination that the voting change is free of discriminatory intent, then the decision goes against the jurisdiction that proposes the change.

Senator **Biden**. To put it in layman's terms, is it fair to say that the benefit of the doubt is given to those opposing preclearance rather than to those who are seeking preclearance?

Mr. **Reynolds**. Yes, that is certainly fair to say.

Senator **Biden**. Would it be fair to say, again, in layman's terms that the Attorney General or Assistant Attorney General is supposed to lean in the direction of objecting rather than preclearing when there is conflicting evidence?

Mr. **Reynolds**. That is right, unless he can resolve the conflicting evidence and make the determination that there is no discriminatory intent.

Senator **Biden**. Mr. Reynolds, in your earlier testimony I asked you if you were aware of allegations that led the court to conclude that one reason the Nunez plan was opposed by some legislator was because of, quote, "antagonism of a number of legislators toward the drawing of a district whose racial composition would facilitate the election of a black Congressman."

And you responded that such antagonism was not the prevalent view, on page 142 of the transcript. Now, do you take the position that you, as the Attorney General, have to prove it is the prevalent view of the legislature in order to object or is it sufficient that just some influential legislators have the view that they do not want a black district? You use the word "prevalent."

Mr. **Reynolds**. I think that the effort is to determine what the mindset of the legislature was. We have in this case, for example, a rather terribly derogatory statement that you had quoted before that was offered to us, but we got it on a hearsay basis which was confidential and we are not able to followup who said it or what the context was or when it was said.

I think that if I have a view that the legislators were acting on the basis of racial animus and that is that even a few legislators influence the result by reason of race, that would be a basis to object until we could get a clarification of that, and if we could not, then the objection would remain on the books.

But it is not the case that just because there is within the legislative body one or two people who are advancing a position for racial reasons that you would get an objection if it could be demonstrated that the other legislators were not, indeed, influenced by that and that what was put in place as a redistricting plan was the product of the other legislators.

Senator **Biden**. With regard to the Nunez plan did your looking at this case indicate that there was as much political pressure to keep the suburban districts all white as there was a rationale for creating an all-black district?

In other words, the testimony that I have gotten and comments that I have received is that it was not so much a case of the legislators getting together in the Nunez plan and saying, "Now, here is how we can create a black district." It was more, "How can we protect the suburban white district." And the byproduct of that was the creation of a black district.

What is your opinion of what political initiative and rationale produced the Nunez plan?

Mr. **Reynolds**. I think the Nunez plan was driven by largely the Jefferson County white district intent on creating a district where they could have total control and that, as a basis for arriving at that, they drew the district in a way that was predominantly white and they felt that, in order to pass muster under the Voting Right Act, they had to have the compensatory black or predominantly black or largely black district, but that I think that what you said is essentially the case.

That the driving force was the Democratic legislators and Democratic Party that wanted a Jefferson County district that it could control, and in doing that, it may well be that a byproduct in some of their minds was the black district.

I am not sure you can go so far as to say "byproduct" because they knew what they were doing, but I think it certainly was the driving force.

Senator **Biden**. Now, back to what constitutes evidence of the legislative discrimination or discrimination on the part of the legislature. If, in fact, there were a single and powerful legislator who had the ability to control the legislative agenda, if he or she were to act with a discriminatory purpose, notwithstanding the fact the fact majority of the legislature did not share that racial prejudice that he or she was evidencing, would that be sufficient to deny preclearance if such a circumstance existed?

Mr. **Reynolds**. I think it would, Senator. In fact, that is very close to the situation that we were dealing with where the question was whether Governor Treen, indeed, had exerted the kind of influence over the legislative body to effectuate the result of the compromise plan and had done it for racial reasons. And I think that, notwithstanding that he was not in the legislature, if he had been in a position where he could have exerted that much influence, if he had acted with racial purpose, then we would certainly have had to have objected.

Senator **Biden**. If I may, Mr. Chairman, could I continue with this line of question for a little while? Does the Senator from Alabama object?

Senator **Heflin**. Go ahead.

Senator **Biden**. Thank you.

Mr. Reynolds, in your three-page June 18, 1982, memo to the file in which you gave your reasons for preclearing the Louisiana redistricting, you stated on page 2, and I quote, "We are similarly satisfied that there was no evidence of racial purpose on the part of the Louisiana legislators in the drawing of the new congressional districts," end of quote.

Now, as I read that, the key word is "no," that you found no evidence of intent on the part of the legislators. Do you believe you were accurate in stating, in retrospect, that there was no evidence of intent on the part of the legislature, none at all?

Mr. **Reynolds**. I still believe, Senator, that when the legislators drew the compromise plan, that they did not do it with racial purpose.

Senator Biden. But was there any racial purpose? I mean, that the preponderance of the rationale for drawing it had no racial purpose, but does that mean that you concluded that there was no, not even a scintilla of racial purpose when they drew that plan, none at all, or just not sufficient?

Mr. Reynolds. I do not think that there was. My conclusion, Senator, was that there was not racial purpose, that what they did was to go back into the room after the Nunez plan was not going to be something that could proceed, and they basically went back to the configuration that had originally existed, and the effort then was to come up with a plan that would not dilute the minority vote and would protect the candidates, the incumbents, if you will.

And that is why the rather curious duck shape emerged, because there was different carving out of small pockets of voters in order to give some to Lindy Boggs' district and others to Livingston's district.

Senator Biden. I hope you understand why I and some others are concerned with your conclusion that it was a political rationale for their action because if that were the case, if we were able to, as a consequence of this case, conclude that all you had to find was that the preponderance of the rationale for moving forward on any proposed change that would require preclearance was political, then, in fact, you could have subsumed with that a racial rationale, although it's not the major part of the reason for the change, but nonetheless, you could have the doubleheader.

It could be mainly political, but also I do not like niggers, bang, you know, which was clearly prejudicial. It seems to me there is a good deal of evidence that, as we discussed the first round of the hearings, that there was, in fact, some evidence of intent on the part of the legislature to discriminate.

Blacks were excluded from the basement meeting when they drew up the plan. The court found that the plan with unerring precision slices through the court's traditional subunit, the ward, in a racially selective manner leaving intact predominantly white wards while carving up the densely populated black wards.

And as to the Governor, the court concluded that the Governor's opposition to the Nunez plan was predicated, in significant part, on his delineation of a majority black district centered in Orleans Parish. And in a confidential portion of your staff memo they brought to your attention, as we mentioned already, that one important legislator defeating the Nunez plan had said, "We already have a nigger mayor. We do not need another nigger big shot."

And finally, the court cited evidence of discriminatory intent on the part of other legislators including the representative who testified at the court hearing that there were legislators who did not feel they wanted to have a district that would be able to elect a black representative. That is page 333 of the court decision.

And although he does not give factual evidence of intent, we, nonetheless, have the conclusion of someone who is considered an expert by many in these cases including yourself, Jerris Leonard, President Nixon's former Assistant Attorney General for Civil Rights, that this redistricting plan was, quote, "one of the most egregious and blatant racial gerrymanders that I have ever seen."

Now, it seems to me that all of these things add up to evidence of conflicting testimony and conflicting evidence. My question to you is, knowing all this, under the burden of proof regulation, do you still take the position there is not enough conflicting evidence for you to change your judgment and, in fact, refuse preclearance?

I mean, what more do you need?

Mr. **Reynolds**. Senator, I have gone back over the *Louisiana* case in the past week and I have reviewed it carefully, and one of the things that I think is a bit of a problem with regard to the colloquy is that you have seen but one side of the case.

There is a whole raft of other materials that we made available down in my office that lay out what the other side of the case is, and I am satisfied, based on my review of this, that I did a conscientious job. That is a very difficult process, and I approached it on the assumption that the burden was on the State and the State had a heavy burden to meet; and I am satisfied that what we were dealing with here was a redistricting that was not something that was driven by or concocted by racial animus but rather that it was a political power play that was involved in the whole struggle and the politics were what resolved it.

I think that there are good and sufficient and adequate answers to every one of those allegations. Whenever one hears one side of a case, it is always terribly persuasive but it was laid before me in very great detail on both sides of the case by my lawyers.

I reviewed it extensively and I am satisfied that there was not racial purpose that was driving that redistricting or——

Senator **Biden**. You do not think there was any racial purpose at all? You could find none anywhere?

Mr. **Reynolds**. I think it was a political redistricting, and that politics was what was involved, and that there was not something—I think the Nunez plan was the one that was probably the one that comes very close to being driven by the racial purposes, not primarily but secondarily.

The Nunez plan was one where the white Jefferson County Parish felt that it could gain control and become predominantly white and balanced it out by drawing a line in a way that would create a predominantly black parish.

And Nunez was vetoed and then they went back to the configuration that was essentially what had been in place for over 130 years, and they did some adjustments of the lines in order to correct for the malapportionment that they were dealing with.

But I have to say that on a review of the record, I am still of the view that the burden was met by the State in this case, and I also would say, Senator, that this is one of the very few cases where I did preclear the statewide redistricting.

I think in all the others or virtually all the others there was an objection, and in some there were two or three objections. This was one that I looked at. I certainly struggled with all the evidence, and I came to that conclusion. And it was the only one where I arrived at that result but I am satisfied on the basis of a full review of the full record that that was a result that was warranted and appropriate.

Senator **Biden**. Again, you, after reviewing the record, find no evidence of racial intent here at all anywhere in any of this? I mean, Mr. Reynolds, how can you look at that district and not figure that something is up?

I mean, I know you say it is a political purpose. I understand that part, and I, for the sake of this discussion, will concede that to you, that that was part of it. And let us say it was a large part of it. Let us say it was the overwhelming rationale for it.

I mean, does it not bother you that when the district is drawn that for every one white district or ward that is impacted upon there are two or three or four or five black wards that are sliced up?

I mean, did you not ask yourself why did not the duck have its head going the other way? I am not being facetious. I am being serious.

Mr. **Reynolds**. And I think that it was because you had a tussle between Lindy Boggs and Livingston and how to protect the incumbents and how many Democrats you had to put in and then how you had to balance that out so as not to have it a dilutive retrogression type of a situation but as one where they were doing it for political reasons.

I would say, Senator, that I have been called upon to look at an extended number of redistrictings. The fact that this one looked like a duck's head is not remarkable at all. We had redistrictings that looked much more peculiar than that that have been precleared, and we have redistrictings in a whole lot of uncovered jurisdictions that look peculiar, and I think when the politics of redistricting gets into it, one of the inevitable results is that you come up with some rather funny and odd shapes that are the product of these pulls and tugs in the political process.

Senator **Biden**. Did anyone in your staff who reviewed this with you suggest that your judgment may be, in fact, impacted upon by your political relationship with the Governor? Was that ever stated to you by anyone on your staff?

Mr. **Reynolds**. That was not stated to me by anyone on my staff that I can recall. I know that accusation has been made. I would simply say that the statehouse redistricting was going on at the same time, and I objected to that, notwithstanding that the Governor had asked that we preclear that one.

I was not at all influenced by any particular relationship with the Governor. We get these in. We have to look at them. I had to probe the Governor's approach to this and attitudes and mine because he was the one that when all was said and done was being accused of racially gerrymandering, if you will, the district, and I was satisfied that he had not done that.

But at the same time or around the same time, I objected to the other redistricting that was involving the statehouses that the Governor also wanted me to preclear.

Senator **Biden**. Why did you object to that?

Mr. **Reynolds**. Because it was my view that in that situation the burden had not been met and that I think it was a racially discriminatory dilution problem. But I really have to go back and review that one to tell you exactly what the decision was based on.

Senator **Biden**. After having concluded that the State plan may have been at least in part racially motivated, did that not—or is that wrong? Am I misstating what you said?

Mr. **Reynolds**. That is not my recollection, but I hesitate now. I keep testifying about things that happened some time ago and then people come back and say my recollection is not as clear.

Senator **Biden**. That is why I want to make sure I understand.

Mr. **Reynolds**. My recollection of it was that it was done for reasons of dilution, that it was a racially discriminatory effect and that there was a retrogression with regard to certain of the districts and the position of the black voters, and for that reason, we felt that we had to object to it.

Senator **Biden**. By the way, the reason why we press you on these things is you raise them and offer them as evidence of your intent on other matters. So that is why they are relevant.

For example, you just suggested, I assume to make the case that you were not, in fact, unduly influenced politically by the Governor that, "By the way, Biden, if I were unduly influenced by the Governor, why would I have not precleared his plan?"

So you offer these things up as evidence to make your case. We do not bring them up. You bring them up to make, in this case, just like when I asked you about the number of people in your organization, the opposition parties, those opposed to preclearing the congressional district case, I asked you how many with whom had you met, and I only know from what I read in the paper that the Wall Street Journal and others have indicated that your staff has stated that you were mistaken on your recollection.

Again, I am not trying to make a liar out of you. The reason I raised them is that you usually offer these points as evidence to sustain your point that in fact in this case you were not unduly influenced.

Let us move to the question of how many folks in opposition, that is, those who did not wish you to preclear, how many of those folks did you meet with, you personally, not your staff, you, so we set the record straight.

Mr. **Reynolds**. I did not have a meeting with any of the people on the opposition as near as I can tell from my records. Now, having said that, I better also say that as near as I can tell from my records, I did not. My recollection was that I had a meeting with a group of people from the opposition but we have checked my records and it appears that my recollection in that regard is confusing this redistricting with some other redistricting.

And my records indicate that there were no meetings with the people opposed to it.

Senator **Biden**. Now, how many times did you meet with—and I am not trying to nitpick; this goes to the question of who carries what burden.

How many times did you meet with the Governor to discuss the specifics of this plan?

Mr. **Reynolds**. Do you want the exact number, Senator?

Senator **Biden**. I suspect you have it. We have it if you do not. I mean, we have your log. I am sure you have it as well as we do. Well, at any rate——

Mr. **Reynolds**. I had two or four. I am not exactly sure.

Senator **Biden**. Did you go down and spend the time with the Governor? Did you fly down personally to see the Governor on this case?

Mr. **Reynolds**. I did go down and see the Governor and the Governor came up and visited me, and a group of State officials with the Governor also came up and visited me. That is the best of my recollection right now, Senator, as to the meetings, but I will not say that that is all of them. I think that is the number. Those are the ones I can recall now.

Senator **Biden**. I have a few more questions, but I will yield. I have been good. This is my first round. So I have been a good boy. I just took two in a row, and I will yield to you and whomever else and then I will come back.

The **Chairman**. The distinguished Senator from Alabama.

Senator **Heflin**. In order to make the record more complete, I am trying to get it complete on this Birmingham matter. I think the order of the court where he denied the summary judgment ought to be entered. This is of course pertaining to the issue of whether or not the United States was under an obligation to defend under the consent decree. And the pertinent part, at least as I read it, I will read and then let you comment, if you desire to comment.

It says, "To the extent that the United States in good faith believes that actions of the city are discriminatory against the plaintiffs and are neither required nor permitted by the consent decree, it may support the plaintiffs position in this litigation without violating the terms of the consent decree and accordingly may be allowed to align itself as a party plaintiff.

In its brief supporting the plaintiffs on these pending summary judgment motions, the United States has advanced arguments that appear to be contrary to its obligations under the decree and inconsistent with positions it pressed so vigorously in the earlier litigation. It seems to be contending that promotion of a minority candidate with lower test scores would never be required by the decree and would constitute a prima facie case of impermissible reverse discrimination and, indeed, that the city would have a duty to seek such information before considering appointment of a minority candidate. Such a position could hardly be consonant with its obligations to uphold the decree, which clearly contemplated that a portion of new appointments would go to minority candidates lower on the eligiblity registers. Its apparent change in position is particularly questionable in view of the fact that it has contended—and documented with extensive evidence in the earlier litigation—that the tests have discriminatory impact against minority candidates and are not sufficiently job related to be valid ranking devices under 42 U.S.C. section 2000 e-2(h). Although permitting the United States to align itself with the plaintiffs, the court will insist that the United States act in accord with its obligations under the decrees." That is signed by Judge Samuel C. Pointer, Jr., U.S. district court judge, February 19, 1985.

Do you wish to comment on anything relative to his findings in this summary judgment? He, in effect, allowed you to proceed as you did intervene and to become aligned as a party plaintiff, but he does make that statement.

Mr. **Reynolds**. Yes, Senator. I would only say that our position in this is one where we are not attacking the decree, and indeed we have taken the position with respect to some of the plaintiffs' claims that we think that the black firefighters or policeman that were promoted were more qualified and that they—we are not saying that those promotions should be undone, and, therefore, we are not siding with some of the plaintiffs' claims.

Whereas there are others where we feel that the evidence indicates that the blacks were demonstrably less qualified, and it is those that we are coming in and saying, we think, violate the decree. But we have not taken a position in this case on an all-or-nothing basis with regard to the decree or interpreting the decree. We have come into the case, and our position turns on what the facts show regarding the relative qualifications of those who are claiming discrimination and those who were promoted and put in the positions.

And there are some where we have said that we agree that the promotions based on the evidence thus far, that the promotions are permissible, and there are others where we have said that we think the promotions were of those people who were demonstrably less qualified, and under paragraph two of the consent decree our view is that we have a responsibility in that situation to enforce the decree to say that that is not a permissible promotion decision.

Senator **Heflin**. That is all that I have of Mr. Reynolds. I do want to ask Ms. Mann some questions.

The **Chairman**. Do you have anything else for Mr. Reynolds?

Senator **Biden**. I have some more of Mr. Reynolds, but I will wait.

The **Chairman**. The distinguished Senator from Pennsylvania.

Senator **Specter**. Thank you very much, Mr. Chairman.

Mr. Reynolds, I would like to return to the subject of whether you elevate your own legal judgments over the judgments of the courts with respect to the issue of school prayer. There has been some questioning of the reference in the memorandum from you to Solicitor General Lee dated October 3, 1983 about Schempp and Engel as wrong and unworthy of respect. And I note that in that memorandum you had suggested raising the issue of challenging Schempp and Engel, and I note that in an earlier memorandum dated June 29, 1983 from you to Solicitor General Lee at it appears at page 1: "The consensus was as argued by both you and Paul that such a position should be advanced only in the Supreme Court and that the Government would be acting irresponsibly were it to urge a lower Federal court to disregard Supreme Court rulings."

There was an extensive article in the Wall Street Journal on this subject dated September 6, 1984, and for purposes of brevity, to go right to the central point, quoting, "Although the Government is not a party in the Jaffee case, Mr. Reynolds wanted to file a friend of the court brief in the Eleventh Circuit Court of Appeals in Atlanta urging the court not only to uphold the decision of the district court, but also to explicitly defy the two leading Supreme Court precedents. A stormy series of meetings ensued within the Justice Department, according to people present. Mr. Lee opposed intervening before the eleventh circuit. He characterized the district court's opinion as 'defiance' of the Supreme Court and argued that to urge an appellate court to endorse that view was a form of 'lawlessness'. According to lawyers at the meetings, eventually Attorney General Smith sided with Mr. Lee, holding that if the Supreme Court precedent was to be overruled, the proper place to make such an argument was in the Supreme Court itself."

My first question is whether you in fact urged Solicitor General Lee to seek to overrule Engel and Vitale in the Court of Appeals for the eleventh circuit.

Mr. REYNOLDS. No, I did not, Senator.

Senator SPECTER. Did I accurately quote from the memo that "the consensus was as argued by both you and Paul"? This is a memo from Solicitor General Lee, "that such a position should be advanced only in the Supreme Court and that the government would be acting irresponsibly were it to urge a lower federal court to disregard Supreme Court rulings?"

Mr. REYNOLDS. That is right. That is correct.

Senator SPECTER. Well, had you urged that the Government take a position that the lower Federal court should disregard the Supreme Court rulings?

Mr. REYNOLDS. No, I had not. We had a discussion on this matter and my position was that we should go into the eleventh circuit and we could argue this case and distinguish it from *Engel* and *Schempp,* and at the same time we could advise the court that we felt that the *Engel* and *Schempp* decisions in the Supreme Court were not correctly decided.

But I agreed with the Solicitor General and with Paul Bator that we could not ask the eleventh circuit to overrule Supreme Court decisions; they were bound by those. But these cases were ones that were distinguishable, and the argument readily could be made that you could come out on these cases without overruling *Schempp* and *Engel* and I had urged that we make that argument in the eleventh circuit.

Senator SPECTER. In the eleventh circuit you sought to distinguish *Schempp* and *Engel* and not to have them overruled?

Mr. REYNOLDS. That is correct.

Senator SPECTER. Was there anybody who argued that in the eleventh circuit the contention should be raised that *Engel* and *Schempp,* that there should be an effort to have them overruled in the eleventh circuit?

Mr. REYNOLDS. I do not recall anybody suggesting that. I know that there was discussion of filing the brief in the eleventh circuit and making it clear to the eleventh circuit that we did not agree with the Supreme Court ruling, but I think everybody was of a mind that it would be improper and irresponsible for us to ask the eleventh circuit to overrule Supreme Court cases.

Senator SPECTER. So the Wall Street Journal article was wrong when it said that you wanted to file a friend of the court brief in the eleventh circuit urging the court not only to uphold the decision of the district court, but to explicitly defy the two leading Supreme Court precedents?

Mr. REYNOLDS. That is incorrect.

Senator SPECTER. The Wall Street Journal was incorrect in saying that?

Mr. REYNOLDS. It was incorrect; that is correct. I did think we ought to go into the eleventh circuit, but I never took the position we should go into the eleventh circuit and ask that it defy *Schempp* and *Engel* and overrule the Supreme Court precedents.

Senator **Specter**. So there was no controversy between you and Mr. Lee, which Attorney General Smith decided?

Mr. **Reynolds**. Oh, there was a controversy; the controversy was whether we should go into the eleventh circuit, and that was very much a controversy. And my view was we should go in on these cases in the eleventh circuit and file an amicus brief in the eleventh circuit and make the argument that this was a case that was different from those two precedents and tell the eleventh circuit we felt those two precedents were not correctly decided.

But there was no controversy with regard to the matter I think that you are focusing on, that is, asking the eleventh circuit to overrule the Supreme Court.

Senator **Specter**. Did Attorney General Smith side with Solicitor General Lee?

Mr. **Reynolds**. He did. He decided we should not go into the eleventh circuit.

Senator **Specter**. So the Wall Steet Journal is correct on that, but the key difference, as you are telling us now, is that your position was not to seek to have the Supreme Court decisions overruled, but to distinguish them?

Mr. **Reynolds**. That is correct.

Senator **Specter**. Let me ask you next about the issue of——

Mr. **Reynolds**. Excuse me, Senator; and to advise the eleventh circuit that we disagreed with the Supreme Court decisions. I just want to make sure—I do not want any——

Senator **Specter**. Advise?

Mr. **Reynolds**. I said that I thought we should go into the eleventh circuit and say this case was distinguishable and it should be decided, but to tell the eleventh circuit we disagreed with the Supreme Court decisions.

Senator **Specter**. Well, what would the point be in telling the eleventh circuit that you disagreed with the Supreme Court decisions if you did not seek to have them overruled?

Mr. **Reynolds**. Well, I think in candor we should, if we did file a brief, advise the court what we viewed the state of the law to be. We do that on a number of occasions.

Senator **Specter**. Why would you do that if you sought simply to distinguish those two Supreme Court decisions?

Mr. **Reynolds**. Well, I think that in order to distinguish them, one of the elements of the argument that you would advance would require that we advise the court that. I thought that was the—as a litigant, that was the proper course to take.

Senator **Specter**. Well, why would it be necessary to advise the eleventh circuit that you disagreed with the Supreme Court in those two cases if you sought merely to distinguish them, to win your case by saying that they did not apply to the facts at bar?

Mr. **Reynolds**. Well, I thought that it made sense for us to do it. If the case went up to the Supreme Court and the Supreme Court had to decide the issue, we were on record as to what our view was of the two precedents in the Supreme Court.

Senator **Specter**. Are you saying that you advised the circuit to that effect so that you would preserve the issue for raising it in the Supreme Court?

Mr. **Reynolds**. Well, I felt that the issue would be—I felt that the way that the eleventh circuit was going to decide the case would preserve the issue. There was a question of that, but I am not going to tell you that my view was we do that to preserve the issue. I thought in terms of briefing the issue, as a lawyer, one of the things in candor we should do is advise the court where we were on those precedents.

Senator **Specter**. And did you brief the issue before the eleventh circuit in terms of overruling the Supreme Court decision?

Mr. **Reynolds**. No, we did not.

Senator **Specter**. Because you did not get that far.

Mr. **Reynolds**. Well, I would not have urged that the eleventh circuit overrule the Supreme Court decision.

Senator **Specter**. But you did not file a brief in the eleventh circuit.

Mr. **Reynolds**. That is right. But I never advanced the notion that we should go into the eleventh circuit and urge the eleventh circuit to overrule the Supreme Court. That you cannot do, and we were all in agreement on that.

Senator **Specter**. Mr. Reynolds, I would like to turn to the issue of school busing for a moment or two. The Lawyer's Committee filing on page 13 quotes you as saying, "I am opposed to busing; I would not use it as a last resort because it does not seem to me to make sense as a last resort to put in place something that has been such a failure."

Do they accurately quote you?

Mr. **Reynolds**. I——

Senator **Specter**. They make a reference to a Washington Post article, December 5, 1983.

Mr. **Reynolds**. I will not deny that I said that. I mean, that sounds like a statement I may well have made. I just do not have—I think probably they are quoting me accurately. If they are quoting me from a newspaper article, I am not sure that I am prepared to say that it is accurate because there are a lot of times that the newspaper does not quote me quite accurately. But I think that if you are asking, does that sound like a statement or a position that I subscribe to, I would certainly say that that is correct.

Senator **Specter**. Well, the question that I raise with you is whether it is appropriate for the Assistant Attorney General to rule out busing as a remedy, as a last resort, whether the Assistant Attorney General agrees with it or not. I frankly think that busing has been a failure, and it has not worked in a great many situations.

But the concern I have is whether the chief law enforcement officer in the civil rights field acts appropriately where the Supreme Court has reserved busing as a remedy, at least in the last resort, in saying that it is not a remedy which the Government would use under the direction or advocacy of the Assistant Attorney General in charge of the Civil Rights Division.

And my question to you is: Do you think it is appropriate where the Supreme Court has retained busing as a possible remedy in the last resort for the Government to say that we will not use it under any circumstances?

Mr. **Reynolds**. Well, Senator, I believe the statement of not using busing as a last resort is in the context of consent decrees which have other formulations for relief in a school desegregation case, voluntary measures, magnet schools. And then the question is raised, should you include in that, busing as a last resort in the event that that formulation that is offered does not work.

And my feeling is that that is not the proper approach to this kind of a problem. I think that what ought to be done is to put forward the remedial relief that we generally advance; in the event that it does not work, look at it at that time and try to figure out where it is failing, and then adjust the remedy to meet what the shortfall is and not move to a busing backup in order to take the place in the event that the original remedy does not work.

And the point I was making is that we have seen this kind of a remedy work imperfectly at best and disastrously at worst in case after case after case. And it seems to me that if on the front end it works in that way, for us to suggest that we would reach for that same remedy as a last resort is simply to condemn the desegregation effort to failure under all circumstances.

And so my view is that if we do indeed have a problem of desegregating, we ought to put together a meaningful and comprehensive relief and we have offered on and put it in place and it has worked very well and we should not turn to busing or the notion of forced busing as a last resort, given the history of that experiment.

Senator **Specter**. If all else failed, would you turn to busing as a last resort?

Mr. **Reynolds**. Well, that is a hard question because I already have viewed busing as a failure, and it is hard for me to see if all else fails why I would leap to another failure. If I had a reason to believe that a busing remedy would assist in the matter, then it seems to me I would be much more inclined to turn to it, but with all the evidence we had regarding forced busing and how imperfectly it has worked, to say if all else fails I am going to reach for yet another failure is to me not a very meaningful solution.

I would rather, if all else fails, take a look at the situation and see what it is that is causing the failure and then accommodate the concern. Now, that is not easy, and I admit that and I certainly know that in terms of the enforcement activity we have done in the division with regard to school cases, there are a lot of complexities in this area. But the problem I have is to say if all else fails I am going to reach for what has been demonstrated to be yet another failure, and my own view is that I am disinclined to take that approach in this area.

Senator **Specter**. Well, Mr. Reynolds, I have a concern with that answer and a statement that you have on page 11 of your reply to the lawyers in terms of two factors: One, recognizing that busing is a remedy which the Supreme Court has said is a lawful remedy; it does not say that you use it first, and it leaves discretion as to when you use it.

At page 11 of your reply to the Lawyer's Committee document you say, "In its long line of school desegregation cases, however, the Supreme Court has never held that mandatory busing is constitutionally required as a desegregation tool." And then you go on on the next page to cast some doubt as to whether busing is an available remedy. You never quite say it is not an available remedy, and I take from your testimony today that you do agree that busing is a potential remedy as a last resort under the Supreme Court holdings.

Mr. **Reynolds**. It certainly is an available remedy.

Senator **Specter**. Well, it is hard to postulate in the abstract that a case might arise where the disadvantages of busing would be outweighed by the advantages. I do not know that there is any such case. I would just like to think or would think it appropriate for the Assistant Attorney General in the Civil Rights Division not to rule out busing as a potential remedy if all else failed and at least subject it to an analysis as to whether the advantages of that remedy outweighed the disadvantages, albeit significant disadvantages might be present.

Mr. **Reynolds**. I certainly think that—I cannot quarrel with that. That would be one of the things that certainly would have to be looked at to determine whether or not that was an answer in that particular situation because it is an available remedy. I have already commented on what my sense is of that evaluation.

Senator **Specter**. Well, I would analogize it to the death penalty in a particularly horrendous murder case, that a public prosecutor might not like, but might feel compelled to submit to the jury where the aggravating factors were provided as required by law. It is not a matter for the personal judgment of the district attorney, if he does not like the death penalty, if it fits the case under the applicable law. Much as you do not like the remedies or much as you do not like the law, it seems to me that is the public official's duty.

My final question, Mr. Reynolds, relates to some statements which were made by the Lawyer's Committee at pages 27 and 28 of their materials where they raise a question about what essentially stated would be their view of your exercise of discretion in your quasi-judicial official as an advocate.

And they say at page 27, "We are concerned by his readiness to abandon those very constituencies whom the civil rights laws were principally designed to protect." On the next page 28 they say, "Congress' primary concern"—and here they are quoting the Supreme Court in the *Webber* case"—Congress' primary concern (was with) 'the plight of the Negro in our economy.' "

And that raises the basic question as to the object of the civil rights laws and whether the Assistant Attorney General ought not be taking an advocacy role in pressing for that objective and that a public prosecutor's job, when you are a public prosecutor in specialized form, has an obligation to press to achieve an objective, not to judge the cases, but to seek in an adversarial context the achievement of the goal.

And I would be interested, as a final question, in your response to what you conceive to be the Justice Department's role carrying out the civil rights laws in terms of an obligation, if any, to promote the principal concerns which the court in *Webber* articulated as being that of the blacks in our society or disadvantaged or women.

Mr. **Reynolds**. Well, I certainly do believe that we have an advocacy role in that regard, and I think that our record demonstrates that we have performed that role extraordinarily well. I think that if you look to what the major portion of the activity in the Civil Rights Division has been over the last 4 years—and by major I would have to say well over 90 percent—we have been in the forefront of advocating the rights of minorities and women and handicapped individuals throughout on the litigation in all of the areas that we are talking about.

The ones that seem to have risen to the level of the controversy that has brought them to major attention and certainly have been the subject of discussions here have been but a few of the major enforcement cases that we have been involved in. We see ourselves as advocates for all individuals in this society who are discriminated against, and I think that it is fair to say that there is a considerable amount of discrimination against minorities and women and handicapped individuals in this country.

We are at the forefront of fighting those kinds of situations. What we do believe in is that those laws are available to everybody. They are not just available to some special groups or some special interests. They are available to everyone.

And, therefore, in those few instances where we have arrived at the conclusion that discrimination on account of race or sex is working to the disadvantage of white males in particular instances and resulting in reverse discrimination, we think that the laws give us a charge that we have to also deal with that discrimination.

But we are in the forefront of advocating the rights of minorities and women and handicapped individuals. Our record in the Civil Rights Division has been second to none in most of the areas over the past 4 years in terms of the number of cases we filed, the number of cases we have won, the number of individual victims who have obtained full redress, made whole, certainly the monetary damages that we have been able to obtain in our employment cases, the number of voting activities that we have indeed treated with and that we have been successful on.

And I would say that, while we do have some fundamental philosophical differences on certain of the issues, if you look at our record, it more than amply demonstrates that we are upholding these laws, and we are upholding them vigorously, and I think probably part of the reason for all the criticism is that we may be a little too vigorous in upholding them because we uphold them for everybody in all circumstances, and where there is discrimination we use these laws to go after it. And that seems to be a source of some controversy, and at least in terms of the cases, it has generated controversy.

I would say that I do not have any disagreement at all with what I understand to be your sense of the way we ought to be operating and the way that that office ought to comport itself under the existing body of laws that we have.

Senator **Biden**. Mr. Reynolds, you know, maybe it's because I know some of the people that know you well and respect you so much that I believe you believe what you just said. I don't understand how you could say what you just said, but I believe you believe it.

Maybe you could answer for me why, if you believe as you do, that you have been so vigorous in the support of and the concern for minorities in this country, they don't seem to like you very much. I'm not being smart, I'm sincere; I'm really trying to figure out how you think. I mean, guys like Bill Quillan tell me and people that I know and you know from home, people I respect a great deal tell me how good you are. So therefore I'm inclined, because I know them and they grew up with you and they know you, to believe—I am being very personal here—but to believe what you said. On the record what you said is difficult to substantiate, in my view.

But forget all that. Why is it that in fact, in your opinion, why is it in fact that the vast majority of those people involved in the pursuit of civil rights, from the black perspective, the perspective of the handicapped, the Hispanics, why is it they don't like you very much?

I'm not being smart, I'm being really serious. What do you think the reason is?

Mr. Reynolds. Well, that's a difficult question for me to answer, Senator.

Senator Biden. I'm sure you've thought about it; you must have—I mean, if you believe as strongly as you do, you have done all this for the civil rights community, you must go home and say—you must have a bit of a persecution complex. I'm not being smart. You must think, why, in God's name, do they not like me, if you believe what you just said. So you must have thought about it.

Mr. Reynolds. Senator, I think that the reason why there is so much division with regard to the issues and with what I have been doing——

Senator Biden. There's not division, though; it seems uniform.

Mr. Reynolds. Well, I think that there are indeed a large number of people in the handicapped community who have come forward and supported my nomination; there are people in the black community who have; there are women who have. I don't think that any of those groups are monolithic, and there is support out there for what we are doing in all of those groups just like there is opposition.

So I would not agree that it is all uniform. But I think that what we are talking about here is a difference of opinion on fundamental principles that are highly emotional. And I have, for whatever reasons, become the personification of those issues. And I think they do come down to pro- or anti-busing, to pro- or anti-quotas. I think those are fundamentally where the major debate is, and that an awful lot of the attitudes are shaped because of perspectives that are determined due to the kind of coverage that we get and the division on what we are doing. Nobody ever hears or reads about all that the people in the Civil Rights Division are doing on behalf of minorities and women and handicapped individuals.

I have submitted it in responses to reports, I have submitted it in terms of materials that I have furnished to this committee; we have a record that demonstrates it—it never gets out. What does get out is the issue of quotas and where I am on that, and because I have that position and I take it to the Court and we prevail in *Stotts*, and I say that I see *Stotts* as indeed being a case where the Court has said that we no longer can have court orders that rely on quotas—all of that generates a great deal of emotion. You have the whole busing issue which has generated a great deal of emotion.

You have the Grove City issue where I came in and interpreted a statute—I didn't write the statute; I did my level best to discern what the intent of Congress was and what the language was, and I went up to the Supreme Court and the Supreme Court said he's right.

And that was something that generated a lot of controversy. The women's groups out there, a number of them, came in and opposed that; they said I was cutting back on the law. There were other people on the other side who said that we somehow expanded it.

Now, I was on the point that that was a controversial issue, admittedly it was a controversial issue. But what I did is, I took the law as it was written and I went to the Supreme Court and said this is how you have to interpret it, and the Court said that's right.

Now, I don't write these laws, and I understand that when you sit down and try to interpret them and you take your case to the courts, they are going to generate controversy on both sides.

But what is overlooked in all of that is the vast amount of enforcement activity that that Division has been engaged in, and it really has been over 90 percent that is geared to minority interests and the interests of women who are being discriminated against on account of sex, the interests of handicapped individuals where we went out and crafted regulations that have been lacking and missing for over 2 years before I ever got in there, after Congress commanded that the Federal Government put together these regulations. There is a whole host of things we have been doing, and they get lost in the rather emotional, and understandably emotional, debate over these key principal issues.

And I think that is why people shape their perceptions and have their opposition—and I think that there are a lot of people out there who agree with what this administration is doing and agree with what I have been doing and agree with the way those laws have been enforced. And at the same time there are a lot who disagree.

And I understand that, and I think that is a product of the office and the job that I was asked to do.

Senator **Biden**. I appreciate your answer. I don't think that is the reason why they are upset with you. I mean, I have a 12-year record of being opposed to busing and opposed to quotas and voting that way, and I don't find the same kind of vigor in terms of my position as I do yours from those groups. But maybe that's politics, you would suggest—I don't know. I just think you should look—there is something beyond that, you have got a problem beyond that with a significant portion of the minority population who I think, if you are confirmed, you at least should be slightly more sensitive to their concerns, if it is nothing more than listening to them more.

But let me conclude my questioning by asking, to make sure I understand it—back to this burden-of-proof question in the—actually, before I do that, let me ask you one other question. You said you enforce the laws as you see them, and you believe Congress meant them to be applied. Let me ask you—in your new position, which is an elevated one in terms of authority, are there any laws that you would suggest that the Department seek changing, seek amending, as it relates to civil rights in this country?

Mr. **Reynolds**. I haven't thought about that specifically, Senator.

Senator **Biden**. I would like, for the record, to ask you to think about that and maybe you could tell us on the record if there are any laws that you think, the way you interpret the Congress meant them to be, they should be, if you had your way—which is the right of the Attorney General's Office to suggest changes; I mean, to suggest that there should be alterations in the law, and ask Congress to do it—you do it every day, you do it—"you" meaning the Justice Department—I would like you, for the record, to answer that question: Are there any laws relating to civil rights of minorities, handicapped and women that you think should be amended?

And, if you would, I would appreciate that for the record.

In your staff's memo—back to the *Treen* case—in which they recommended an objection to the Louisiana plan—you pointed out differences of opinion between—your staff pointed out differences of opinion between the Governor of Louisiana and the Louisiana Black Legislative Caucus. For example, on page 13 of that memo, it is stated "Louisiana Black Legislative Caucus, consisting of 2 black senators and 10 black representatives, unanimously oppose the submitted plan as a dilution of minority voting strength and blames Governor Treen as one chiefly responsible."

Your staff cites a written comment to the Department of Justice by the Black Legislative Caucus in which these views are stated, which is dated January 18, 1982, 6 months before your final decision.

Your staff also stated in this memo that Governor Treen felt that black interests would be better served by having influence in two districts rather than a majority in one, but your staff found that "No State black leader, in or out of the Louisiana Legislature, supports Governor Treen's view," page 26 that was. And that the Black Legislative Caucus was of the opinion that the plan intentionally diluted black voting strength.

Now, my question, Mr. Reynolds, is: Why did you personally not meet with the Black Legislative Caucus? After reading this memo, you are obviously aware.

Mr. **Reynolds**. Senator, I was not aware that they had requested a meeting.

Senator **Biden**. No, I know that, but——

Mr. **Reynolds**. And had they requested a meeting, I certainly would have met with them.

Senator **Biden**. But shouldn't you, in light of noting through your staff their strong objection—wouldn't you seek a meeting with them? The burden is on the State, why would they have to request a meeting from you? Why wouldn't you—you saw the Governor, you saw him again, you are in contact with him on telephone, he personally came to see you, you personally flew to see him—I mean, why wouldn't you, in vigorously pursuing this matter, why wouldn't you ask to meet with them?

Mr. **Reynolds**. Precisely because the burden was on the State, and they had the presumption going in their favor, and therefore—and they submitted a number of written materials plus they met with my staff—and, as I said earlier, they had the best representation I think anybody could get in this country with regard to lawyers on my staff arguing that position. I was not trying to not meet with them, but, given the fact that the burden was on the State, it was my view that as far as their position was concerned, they had a presumption going for them and it was up to the State to disprove it.

Senator **Biden**. But at one point you concluded that that presumption was no longer going for them. At one point you concluded, aha, they have lost the presumption.

Now, why at that point didn't you go back to them and say I am about to rule this way—make your case.

Mr. **Reynolds**. That decision was made on June 18, at the end of the day, and I had had about a 2½-hour session with my staff going over the Louisiana case in excruciating detail, plus I had had a couple of earlier meetings with them. And at that point I made the decision, and we had a statutory deadline which required that the decision be announced on the 60th day, or 60th day after receiving more information.

So at that point I did not—there wasn't an opportunity. But their views had been fully and completely expressed; they had submitted them in writing—I had seen that; my attorneys had briefed me fully and we had gone through a very long extended discussion back and forth with all of the different allegations that were made.

Senator **Biden**. Well, you testified before that you met with a large number of opponents of the Louisiana plan, and you have now clarified, but you said you confused—you may have confused that with other plans in the decision of which you met with opponents—is that right, is that your explanation?

Mr. **Reynolds**. My recollection was that I had met with an outside group, and I have obviously confused that with——

Senator **Biden**. It turns out you have. But is it your normal practice to meet with a large number of opponents in redistricting plans in other districts? I mean, can you name me cases where you have met with a large number of opponents to the plan?

Mr. **Reynolds**. I'm sorry, we may be—I don't want another ambiguity. When I say a large number, my recollection is a single meeting where there was a large number in the meeting. I am not suggesting a whole series of meetings.

And it depends on the redistricting. There are redistrictings where I have gone through and reviewed, and there have been meetings with groups who were opposed and there have been other ones where there have not been meetings with groups who opposed. It has not been uniform in that regard.

We meet on these generally with anyone who requests a meeting of us, to the fullest extent we can.

Senator **Biden**. Who did you seek out in this case that represented the point of view that you shouldn't preclear; I mean, did you say at any point in this whole process to your staff, look, go get so and so?

Mr. **Reynolds**. No.

Senator **Biden**. I mean, bring him in, or ask him to come in, explain to me why we shouldn't preclear. Did you do that at all? I mean, was there any instance?

Mr. **Reynolds**. No, the approach for this from the beginning was that we would not preclear unless the State could demonstrate to us that there was no discriminatory intent, so I did not do that.

Senator **Biden**. But isn't that measured against those who think you shouldn't preclear? I mean, it's like my saying that I have got this group over here that opposes my point of view or opposes passing this legislation, and I got this group that is for it.

Mr. **Reynolds**. Right.

Senator **Biden**. I meet extensively with the group that is for it, and they satisfy me that, well, I should be for it. Should I not at least give those who are opposed an opportunity or should I not go seek them out?

Mr. **Reynolds**. Most of that is done by my staff, and that is what the whole process for investigation is for. The staff does an awful lot of meeting with different sides of these, and then they present the views to me.

Senator **Biden**. But you felt necessary to go beyond that to meet with those who wanted to preclear because you wanted to personally be sure they met the burden?

Mr. **Reynolds**. That is correct. They had a burden that they were not operating with a discriminatory intent and they had to satisfy me that there was not that racial intent involved.

Senator **Biden**. Why did you not measure what Treen and others said against those who is—I do not understand? We work differently. I mean, when I have someone to come before me and I do not have the burden that you have, but as a legislator, I give people an opportunity to make their case, if, in fact, one group convinces me that they make a case that I should vote yes on a particular item and, in fact, I know there is a strong body and a large group out there, a significant opposition to my voting yes, at least what I do is go to the group who says vote no and say: "Now, look this is what the group that says yes says. Now, tell me how I am wrong. I am inclined to agree with them. It seems as though yes is the way I should vote."

I mean, you said in your former testimony this is one of the biggest cases that you had for preclearance, and yet you, the staff, sought out—I am not even sure how much they sought out, but they sought out people but you did not seek out anybody to bounce off these statements and assertions by Treen.

I mean, did it not seem a little paternal on your part that Treen would suggest what is best for blacks? I mean, does that not smack, from a southern Governor who is plain, for whatever reason you just refused to preclear for a State, that he sits and says that I believe that it is best for blacks that there be two districts?

Does that not ring a bell or something? Does that not do something to you? Have you not heard that kind of stuff before?

Mr. **Reynolds**. Well, Senator, Governor Treen was not trying to say what was best for blacks. Governor Treen was saying that if you look at the Nunez plan which had, I think, a 43-percent black population, and you were comparing that with whether you were going to have two where there was a 38 and a 29 percent, that he felt that the black influence would be greater with the two, and I think that——

Senator **Biden**. Well, is that not best for blacks? Did he not conclude that blacks were better served by having influence in two districts? I mean, I thought we established that. You said, I thought you said he said that.

Mr. **Reynolds**. Right.

Senator **Biden**. He said that in the press. He said it on the record.

Mr. **Reynolds**. Sure. I think that was his view, and that was shared by some others. It was not just Governor Treen. There were others who also had that view that the black influence on the electoral process, if you give them one 43-percent district where there was, I think, 43-percent registered voters, where there was little likelihood that they would carry that district with that or you had two districts in which they had 38 and 29 percent that you were talking about an influence situation that was better when they had the two.

Senator **Biden**. I understand that. Is that not a little paternal? That is a little bit like, you know, I mean, a little alarm bell would go off in my head if I sat in a meeting with the Saudi Ambassador who told me, "I know that is best for Jews. I think it is better for the Jews to have a larger country of Palestine which has these larger borders than a smaller country if Israel where, in fact, they are all by themselves. I think it is best for Jews."

I would immediately go, uh-huh, now wait a minute. I am trying to figure how you think.

Mr. **Reynolds**. Well, Senator, as I say, it is too bad you have not had an opportunity to talk to Governor Treen and——

Senator **Biden**. Oh, I have, not on this. I have had an opportunity to talk to him.

Mr. **Reynolds**. I mean, to talk to Governor Treen on this matter and review the unbelievable amount of material that is on the other side of this case.

Senator **Biden**. But I know Louisiana's history. I know a little bit about how they work. I know as a legislator the pressures that are on people like me and Governors. I know of what I speak when I suggest that it is preposterous to think that there is a desire on the part of a majority of the folks who would be speaking to a Governor of a Southern State or the State of Delaware that, in fact, we should not worry about what our constituency thinks, it is OK to create a black district.

I mean, it is, on its face, difficult for a white politician in the State of Delaware and particularly the State of Louisiana with the history that our States have had to, in fact, take a position that would be viewed as pro-black. Would you not agree with that? Do you not think it is difficult for any southern Governor to take a position that is viewed clearly as pro-black?

Mr. **Reynolds**. Well, I certainly would not leap to that conclusion.

Senator **Biden**. Well, let us just talk about our own State of Delaware, the State that had signs on bathrooms saying "White Only" up until the mid-1950's, had in its constitution a prohibition until 1968 that blacks could not go to school with whites.

I mean, do you think if a State senator from Daggsboro suggested that I know what is best for blacks. I think it is better that they have two districts, would you automatically assume that that had the same force and effect if a black legislator from the city of Wilmington said I know what is best for blacks?

Gosh, Mr. Reynolds.

Mr. **Reynolds**. Well, I do not think that is the situation here, of course. Here we are dealing with a redistricting where the commentary was being made regarding a comparison of the influence that the blacks had in one district as opposed to what they had in it if you did the other.

Senator **Biden**. Yet every black said I do not agree with that. Every black in the State said we do not think that is best for us, every black.

Mr. **Reynolds**. Well, that is why I wish that you would review the other side of the case because I think, Senator, that what you have is one side of this issue. This is an issue that has an extensive record to it on both sides.

Senator **Biden**. I know. I have reviewed it.

Mr. **Reynolds**. Well, what I am saying is, Governor Treen certainly can shed some light on what this whole redistricting was all about. There are an awful lot of other people who were involved in it.

I talked to them. My staff talked to the other people who were involved in it. I went through an extensive analysis of the whole case with my staff.

Senator **Biden**. I understand. I am not trying to press the whole case. I am just trying to get where you think.

I am really trespassing on your time and the committee's time. Let me conclude by asking you this. Is there any black woman or man in Louisiana that you know of, you spoke to, that spoke to your staff or anyone else that said we, in fact, like the Governor's proposal?

Do you know of any one? Did you find anyone who is black who said that?

Mr. **Reynolds**. I do not know.

Senator **Biden**. I submit to you that there were none, and in the face of that, to have a Governor who says, but I think blacks are better represented by having a proportion of the influence in two districts, that seems to me it should send up alarm bells when it is clear as we went through in the questioning that the overwhelming burden is upon the State to prove that it does not discriminate, that, at least, it seems to me, should have said to you: "I better go sit down and talk with those black legislators now that I think the State has met the burden. I should at least give them a chance, not wait for them to come to me, not wait for the request. I should be vigorously purusing. I should continue to assume," I mean, it is different if you had the black community split.

It is different if you had some civil rights activists saying, "Yes, he is right" and some saying "He is wrong," and Treen saying something. But here you had a southern Governor who has pressures of his own that I understand well saying, "I think it is good for blacks," and you have every black saying, "I think it is bad for us."

And you do not bother to go to them after the fact, you have made your conclusion that, in fact, you should preclear. I find that at least lacking in judgment as to what the obligation of the attorney general in charge of the enforcement of civil rights under section 5 preclearance calls for.

Anyway I am sorry. I take too long.

The **Chairman**. I want to ask you a question, Mr. Reynolds. You have the whole United States to look after. Would it be possible for you to meet with every group and every district of every State of the United States or do you have to depend on your staff to meet with a lot of these people?

Mr. **Reynolds**. Certainly, in the voting area, my staff is very much a part of the operation and I would have to rely on them to do an awful lot of the investigation, and do, Senator. But I also have an open-door policy and I will met with anybody and everybody I possibly can who wants to meet.

The **Chairman**. As I mentioned this morning, you had between 50,000 and 100,000 different matters to screen, have you not, since you have been in office?

Mr. **Reynolds**. I have had a large number. There have been that many preclearances, but I have not personally been involved in all of those. But I have been personally involved in approximately 300 or so.

The **Chairman**. It would be impossible for you to get involved in every one of them. You have to depend on your staff to a great extent, do you not?

Mr. **Reynolds**. That is correct.

The **Chairman**. The distinguished Senator from Alabama.

Senator **Heflin**. I have no questions of Mr. Reynolds.

The **Chairman**. All right. Does anybody have any questions of Mr. Reynolds?

[No response.]

The **Chairman**. If not, we are going to excuse him now, or you can sit there if you want to, and ask Ms. Mann to come up.

Senator **Biden**. Ms. Mann may need some staffing.

The **Chairman**. Ms. Mann, I believe we have already sworn you, have we not, so I would just remind you that you are under oath. The distinguished Senator from Alabama had a question he wanted to ask you. Mr. Reynolds, you might stay in case you want to confer with her any.

Senator **Heflin**. Ms. Mann, I believe you were going to check the records pertaining to the letter of November 26, 1984, which purportedly was signed by you, addressed to Mr. Raymond P. Fitzpatrick of Birmingham in connection with the Birmingham reverse discrimination employment litigation.

Have you checked that letter?

Ms. **Mann**. Yes, Senator, I have.

Senator **Heflin**. All right, and a copy of that was furnished you in advance. Other than the name deletion, was there any difference in your original letter and the copy of it that was entered into the record?

Ms. **Mann**. Senator, I did not do a word-for-word comparison, but I do believe the copy entered in the record was substantially correct.

Senator **Heflin**. All right. As I understand it, there is a request—at least Duke Short has told me that the attorney representing the man involved did not want the name involved, so I therefore respect that wish and will not reveal it.

But as I understand it, this involves an incumbent black policeman who had been promoted in Birmingham and involved in these

Birmingham reverse discrimination proceedings. They had taken a deposition and the Department of Justice, as this letter indicates, provided some information from the sheriff's office in a town in South Carolina and some from a clerk's court in Davies County, NC, and maybe some others.

And there was a statement "that the FBI is also forwarding me copies of the same as soon as they are received." Did you or anyone in the Department of Justice send to Mr. Fitzpatrick an FBI record?

Ms. MANN. No, sir.

Senator HEFLIN. Now, in regard to the use of the FBI in this type of case, was there any memorandum that was sent to the FBI which set forth a purpose for acquiring the information?

Do you have in your files the memoranda that were sent to the FBI which set forth the purpose for acquiring this?

Ms. MANN. Senator, there were no memoranda sent to the FBI. I simply placed a phone call, and let me clarify one point in response to your earlier question. I think when I previously testified, I indicated that I thought I had turned over a copy of the paper that we received from the FBI to Mr. Fitzpatrick.

But I did not have a specific recollection of what that paper was. After going back and checking my files, I did determine what that paper was. I contacted Mr. Fitzpatrick. I also reviewed all of the files to see if there had ever been any correspondence indicating that it had been sent to them. There was none.

I contacted him and he indicated that no, in fact, I had never sent it to him. So I stand corrected from my testimony this morning. It was never sent to him.

Senator HEFLIN. Well, if you sought information from the FBI, isn't there a requirement, of the Department of Justice, that you have to have some type of a written directive or memorandum which would set forth the purpose for which the information is being acquired?

Ms. MANN. Senator, I am not aware of their procedures. This was a very informal request and I—this was not a situation where I was expecting the FBI to do a background investigation or anything like that.

This matter simply concerned a substantial ambiguity in this individual's testimony concerning a prior arrest, and I simply called the FBI in the same manner that I called the clerk of the court in North Carolina, the sheriff's office in South Carolina, to determine whether or not they had a record that this man had been arrested or convicted of a crime.

I did not intend for them to divulge to me any confidential information and I was never informed that there was a procedure whereby one had to submit a written request. Again, as I indicated earlier, I was relatively new in the Department and if there was such a procedure, I was not aware of it. But I certainly was never informed as such.

Senator HEFLIN. Well, did you obtain a rap sheet from the FBI which revealed the information pertaining to South Carolina and to North Carolina and these other places?

Ms. MANN. Senator, I received one piece of paper from the FBI. I am afraid I am not familiar with what a rap sheet is, so I cannot indicate whether or not what I received is a rap sheet or not. It was just a single piece of paper that had three notations on it.

Senator **Heflin**. Well, did it have, in effect, a history of his arrests? Do you have the paper that you received?

Ms. **Mann**. Yes, Senator, I do.

Senator **Heflin**. Would you produce it and put it in the record, please? Would you read us what is on the record, without revealing anybody's name?

Ms. **Mann**. Senator, if I could, I would like to protect the confidence of this.

Senator **Heflin**. Well, sure, we will do that.

Ms. **Mann**. The piece of paper I received at the top says "United States Department of Justice, Federal Bureau of Investigation, Washington, DC." There is an FBI record number and then it has listed three contributor fingerprints, and it has "PD, Birmingham, AL; DOD NACC Fort Holibird, MD," and then "SO Beaufort, SC."

It has the individual's name and number. It has a column indicating arrested or received and there is a column indicating "charge." In the column it says "PD, Birmingham, AL." The charge is indicted "B and GL." There is no charge indicated by the Fort Holibird notation, and for Beaufort, SC, the charge is "Viol," which I assume is "violate," "narc law," and that is all that was indicated on the piece of paper.

Senator **Heflin**. Well, would you submit it to Mr. Short? We will see that the confidentiality of the individual's name is protected. I would assume that it will be placed in the record. I would like to look at it.

It says,

> The following FBI records—such and such—are furnished for official use only. Information shown on this identification record represents data furnished FBI by fingerprint contributors. Where final disposition is not shown or further explanation of charge is desired, communicate with agency contributing those fingerprints.

It appears that there are three instances in which fingerprints appeared, which, as I understand, would be a rap sheet. Now, in regard to this, did you then contact the South Carolina sheriff's department in order to get a copy of their documents there?

Ms. **Mann**. No, sir; testimony had been elicited during the first part of this individual's deposition, as I indicated, concerning a very ambiguous arrest or conviction in South Carolina. And I believe when I returned to Washington from Birmingham after the first part of this deposition, I believe simultanously I placed telephone clls to the sheriff's office in Beaufort, SC, and to the clerk of the court in North Carolina, and to the FBI office.

Again, this was not done with authorization by Mr. Reynolds. It just never occurred to me that there was any impropriety whatsoever with calling the FBI.

Senator **Heflin**. Well, did you discuss it with anybody?

Ms. **Mann**. The only person that I might have discussed it with would have been another Justice Department lawyer who was working with me on the case, and any discussion would have been to the effect that we need to determine whether or not this individual was telling the truth and we need to clear up this ambiguity in the deposition before we go back and finish his deposition.

Senator **Heflin**. Well, prior to your sending this letter, is it not standard procedure in the Department of Justice that someone has to review your letter before you would send it?

Ms. **Mann**. No, sir.

Senator **Heflin**. No one reviewed your letter to Mr. Fitzpatrick?

Ms. **Mann**. Absolutely not. I am the senior trial attorney on the case and review of my work is not required.

Senator **Heflin**. Now, when you testified this morning you stated that the information it was made available to counsel on the other side for the city of Birmingham. When was that made available to them?

Ms. **Mann**. Senator, it was made available to them in response to their request for production of documents addressed to the United States. We agreed upon a time for production, and that production of documents took place last Wednesday and Thursday.

They were in my office for 2 days looking at documents and these were some of the documents that were produced.

Senator **Heflin**. But before this deposition was taken the Department never made available to the other side any information. Is that correct? You were, in effect, dealing ex parte with only Mr. Fitzpatrick and the parties that he represented?

Ms. **Mann**. Senator, first of all, I was the one that had noticed the deposition and was taking the deposition. I do not know when I received this information from the FBI. It did not come with a cover letter and I have no notation, so I do not even know if I had it before the conclusion of his deposition. But I did not make it available to the city.

Senator **Heflin**. Now, at least, the Lawyers Committee For Civil Rights Under Law has raised the point that if the Civil Rights Division had turned confidential FBI arrest records and files over to Raymond Fitzpatrick for its use, it would be an apparent criminal violation of the Privacy Act, 5 USC, section 552 AB and 552 AI. Copies of these provisions were attached.

> To use these records in order to obtain derogatory information from other sources without turning over the records themselves is at least highly improper. In law, the information obtained from an illegal source cannot be used to obtain information from other sources. The fruit of the poison tree is in itself poisonous.

That is their statement.

Now, it may be questionable as to whether or not there were any confidential FBI arrest records turned over to them. It would have the appearance that in the letter you say, "Enclosed, please find a copy of the documents I received from the"—how do you pronounce that, Beaufort, SC.?

The **Chairman**. Beaufort.

Senator **Heflin**. Beaufort, all right.

The **Chairman**. In North Carolina, they pronounce it Beaufort.

Senator **Heflin**. Well, I just wanted to get it Southern.

The **Chairman**. It is a nice place to visit. [Laughter.]

Senator **Heflin**. Obviously, after receiving some information about that, they had to then turn around and go to the Beaufort, SC, sheriff's office to get this. Now, whether or not this indicates a violation of the Privacy Act or not, I am not sure.

But what disturbs me here is that a consent decree is entered into in which the Justice Department fashioned it and agreed to defend the consent decree. Now, it is subject to interpretations, but it would appear that a great deal of information was furnished privately that ought to have been made available, from the people's lawyers, to both sides.

And it would appear to me that this is showing some partiality involved in this, and if that is the policy of the Department relative to these matters, using the FBI to collect information, then that is highly questionable and perhaps is a matter that I imagine the court will want to go into in the final determination of that case.

Ms. MANN. Senator, if I might respond to that, just to be sure the record is clear, first of all, copies of the information from Beaufort, SC—that was the only thing that was attached to my letter.

Every bit of information that we obtained concerning this individual's arrest record has been made available to every party to the case, with the exception of the FBI report, which was not available, has not been produced from Mr. Fitzpatrick. But it has been produced for everyone.

And I want to also point out that this is——

Senator HEFLIN. Well, it was only presented to them last Wednesday, was it not?

Ms. MANN. It was the only time, though, that it was requested. I mean, as soon as—Senator, as soon as it was requested——

Senator HEFLIN. Well, how would they know that you had it?

Ms. MANN. Senator, their document request was extremely broad and it covered—this was produced pursuant to a request where they asked for documents relating—concerning any of the named plaintiffs or any of the individuals who were promoted, and we, in very good faith, complied with their document request and made a very substantial number of documents available.

Senator HEFLIN. Well, let me ask you this. Did you ever have any discussions about this with Mr. Brad Reynolds?

Ms. MANN. Absolutely none, sir.

Senator HEFLIN. And you are the chief litigation counsel in the Civil Rights Division?

Ms. MANN. I am not sure that is quite an accurate characterization.

Senator HEFLIN. I see. Well, I understood you to say——

Ms. MANN. My title is special litigation counsel. I am the senior trial attorney on this particular case.

Senator HEFLIN. I notice on the letter that it says copies to Records Section, and then in caps, "CHRON." What is that?

Ms. MANN. To tell you the truth, I am not actually sure. I think that that is similar to a secretarial file, but no copies of this letter were sent to Mr. Reynolds. It would be indicated on here had an indicated copy or a blind copy been sent to him.

The copies that you see indicated where it says "Records Section, CHRON, Subject File"—were blind indications that would not have appeared on the original that went out, and had a copy gone to Mr. Reynolds, his name would appear there, and it did not.

Senator HEFLIN. Well, at the top of the page where it has those initials, have you found out the significance of that code? Can you shed any light on that?

Ms. MANN. As I testified this morning, Senator, this is the designation that my secretary—and I do not know whether this is true of all secretaries, but this is the designation that they use whenever I dictate or write a letter. They put Mr. Reynolds' initials; they put another person's initials; they put my initials.

But this was solely my work product. It did not mean that copies went to any of these people. Underneath is the date that the letter was typed, and then my secretary's initials. But those are not indications of copies; it is just the way that they designate it.

Normally, the letters are signed, William Bradford Reynolds, by Mary E. Mann, and I guess that is the reason for using the initials. But it does not indicate that copies were sent to these people.

Senator **Heflin**. I do not have any further questions. I would like to introduce an affidavit of George Carroll Whipple III, which, in effect, says that they had no knowledge of these. I will introduce this affidavit.

The **Chairman**. Without objection, so ordered.

[Affidavit follows:]

BEFORE THE COMMITTEE ON THE JUDICIARY
OF THE UNITED STATES SENATE

In the Matter of the Confirmation
Hearing of William Bradford Reynolds

AFFIDAVIT OF GEORGE CARROLL WHIPPLE, III

George Carroll Whipple, III being duly sworn deposes and says:

1. I am associated with the law firm of Cravath, Swaine & Moore and am the associate here most involved in the action pending in the United States District Court, in the Northern District of Alabama captioned In Re Birmingham Reverse Discrimination Employment Litigation in which my firm, along with the Lawyers' Committee for Civil Rights Under Law and the law firm of Reeves and Still, represents the Defendant-Intervenors John W. Martin *et al.*

2. I have not nor to my knowledge has any other attorney representing the Martin Defendant-Intervenors ever received from William Bradford Reynolds, Charles Cooper, Mary E. Mann or any other attorney or employee of the Department of Justice any documents from the FBI or from local municipalities relating to arrest records of any black promotee who has testified or is otherwise involved in the Birmingham litigation; until such documents were produced to us in response to a document request on June 12 and 13, 1985.

3. I did not know that any arrest records received by the Department of Justice from a local law enforcement agency were turned over to counsel for the white male named plaintiffs by the Department of Justice until I reviewed certain transmittal letters in the Department of Justice's files on June 12 and 13, 1985.

4. Although I suspected that FBI information was turned over to counsel for the white male named plaintiffs as a result of the review of June 12 and 13, 1985, referred to in the preceding paragraph, I was not sure that was the case until I was informed that Mary E. Mann testified to such under oath today.

GEORGE CARROLL WHIPPLE, III

Sworn and subscribed to before

me this 18th day of June.

Carol Ann O'Connor

Notary Public

CAROL ANN O'CONNOR
Notary Public, State of New York
No. 010 4724618
Qualified in Westchester County
Term Expires March 30, 198[illegible]

The CHAIRMAN. Ms. Mann, what was the ambiguity here you were trying to clarify?

Ms. MANN. Senator, when we obtained this individual's personnel file from the city of Birmingham, there was an application for employment and the application—one of the questions asked was whether or not you have ever been arrested or, I believe, convicted of a crime.

And there was only one arrest that was mentioned, as I recall. It was for driving without a license. And during the course of this individual's deposition, as I asked everybody I deposed and as was the standard procedure when any depositions were taken, we always asked whether or not this person had ever been arrested or convicted of a crime.

And his testimony was extremely ambiguous. He indicated that he had spent some 3 months in jail, but that he had never been arrested. Later in his testimony, he indicated that he had a lawyer that had told him—asked him if he had any money and if he—as I recall, he said if you do have some money, plead not guilty, but if you do not have any money, you had better just go ahead and plead guilty.

Senator BIDEN. That sounds reasonable.

Ms. MANN. And it just—there was some other testimony concerning possession of narcotics, but he claimed he never had them anyway. It was just very vague and ambiguous. Yet, he kept claiming he had never been arrested or convicted of this crime, and it did not show up on his application.

And so it was something that we were trying to determine whether or not this man had a criminal record, and also to find out if it would have a bearing on his credibility.

The CHAIRMAN. Thank you.

I think this concludes our hearing. Senator Heflin, do you have any more questions of anybody?

Senator HEFLIN. No.

The CHAIRMAN. Senator Biden, do you have any more questions?

Senator BIDEN. No questions; just two brief comments for the record. I think the fellow was probably telling you the truth if he had a lawyer who said plead guilty if you do not have any money, and if you do have money, plead not guilty. That is the way it works. I practiced as a defense lawyer. That is how it does work, in fact.

The CHAIRMAN. Where is that?

Senator BIDEN. In most places. But at any rate, that is not what I wanted to say.

I would like to say to Mr. Reynolds, you showed a great deal of perserverance. Thank you for persisting, and I compliment your mother and father and wife for being able to sit through all of this and not once consider picking up a glass of water or anything else and heading in this direction.

So I admire their restraint and loyalty to you, and thank you for putting up and going through all of this. And good luck to you.

The CHAIRMAN. Well, the main thing is to vote for him. [Laughter.]

I want to say that a point was raised this morning by Senator Metzenbaum relative to a memorandum pertaining to the Lincoln

County Board of Supervisors. The question concerned when and under what circumstances this document was made available to the committee.

A memorandum pertaining to the lawsuit against the Lincoln County Board of Supervisors dated July 26, 1983, was provided to the committee on May 28, 1985, by the Department of Justice. This document was included in a package of documents provided by the Department of Justice at the request of Senator Biden on behalf of certain minority Senators.

The package consisted of five total copies, four of which were provided to Senator Biden's staff as soon as they were received in my office on May 28. Again, the memo in question was included with these documents and was labeled "1(3)."

I think we have given a full opportunity to all witnesses in previous hearings and today to attend this hearing. Mr. Reynolds was asked to come back and we brought him back, and we have now given a full opportunity to the Senators to examine him not only on the point that Senator Mathias requested that he be brought back for—a little discrepancy in his statement on something and some other witness—but we have gone into matters that we have gone into before. We have gone into them over and over and over again.

And I think that under the circumstances, I wanted to allow great flexibility so no one could complain that they did not have a full opportunity in this hearing to examine Mr. Reynolds.

Now, after all the hearing and the examination, I am convinced from the previous hearings and the hearing of today that Mr. Reynolds is an honest, capable, and dedicated public official. I am convinced that he stands for equal treatment under law. I am convinced that he is against discrimination and that he has tried to be fair to all parties.

As he stated, some people take a different view of a different position that he has taken, and that is natural. In the Presidential race that was held last time between President Carter and President Reagan, the people in the country took a different view.

But Mr. Reynolds here has carried out the program of the President. The President was elected and he defeated Mr. Carter, and therefore he put his policies into effect. Mr. Reynolds is carrying out those policies.

And it seems to me that Mr. Reynolds should not be blamed for some of the things that have been brought against him. I want to say again, too, that four attorneys general have endorsed Mr. Reynolds; Mr. Rogers, who served under President Eisenhower, endorsed him, and Mr. Bell, who served under President Carter, has endorsed him, and Mr. Smith, who served under President Reagan, has endorsed him, and Mr. Meese, the present Attorney General, who recommended him, of course, has endorsed him.

And it seems to me that, further, the President of the United States not only has appointed him to this position, but he has praised him. He says he has done a good job. I think Mr. Reynolds should be confirmed and I hope the Senate will confirm him.

Now, we are going to meet Thursday of this week to vote on Mr. Reynolds' nomination. I hope there will not be delays. I hope, in fairness to the President, in fairness to the people of this country, and in fairness to the Senate, that we take a vote here and act on this matter and not delay it further. It has been delayed now for several months; now is the time for action. At that time we will vote.

The record is now closed. We now stand adjourned.

[Whereupon, at 7:20 p.m., the committee was adjourned.]

APPENDIX

AAPS

5201 Lyngate Court
Burke, VA 22015
(703) 425-6300

Association of American Physicians and Surgeons, Inc.

May 23, 1985

Dear Senator Thurmond:

The Association of American Physicians and Surgeons urges you to confirm the nomination of William Bradford Reynolds for the position of Associate Attorney General in the Department of Justice. The AAPS membership believes that Mr. Reynolds, after serving with distinction as Assistant Attorney General for Civil Rights, deserves this promotion.

A cursory examination of the activities of the Civil Rights Division (CRD) during the Carter and Reagan Administrations reveals that Mr. Reynolds pursued the goal of achieving a society free of discrimination with uncommon skill and heartfelt commitment. Mr. Reynolds initiated more civil rights prosecutions than did his predecessors in the Carter Administration. He participated in more Voting Rights cases, reviewed more voting changes, and registered more objections to the implementation of discriminatory changes.

But Mr. Reynolds' clearly superior civil rights record is even more impressive when it is understood that his CRD waged such a vigorous war against discrimination without resorting to the pro-quotas/ anti-business tactics, which, when employed in the past, have done so much to cripple the economy and disrupt our society.

The nomination of Mr. Reynolds for Associate Attorney General deserves your support.

Sincerely,

Charles R. Ord

Charles R. Ord
Executive Director

Private Doctors Conference, March 26-30, 1985, Fairmont Hotel, San Francisco, California
Annual Meeting, September 25-October 1, 1985, Inter-Continental Hotel, Maui, Hawaii

ADL
Anti Defamation League of B'nai B'rith

Kenneth J. Bialkin
National Chairman

One Citicorp Center
153 East 53rd Street
New York, NY 10022
(212) 935-8000

May 24, 1985

Senator Strom Thurmond
Chairman
Senate Committee on the Judiciary
SD-224
Dirksen Senate Office Building
Washington, DC 20510

Dear Mr. Chairman:

We are writing you in connection with the nomination of William Bradford Reynolds to be Associate Attorney General of the United States.

The Anti-Defamation League has long been in the forefront in the fight against discrimination and for equal opportunity. From its beginnings, its charter, adopted in 1913 set forth as the object of the League "to stop...the defamation of the Jewish people" and as "(i)ts ultimate purpose...to secure justice and fair treatment to all citizens alike..."

Beginning with *Shelley v. Kraemer* *in 1947 in which the Supreme Court outlawed the enforcement of racially restrictive real estate covenants, the ADL has participated in almost every major civil rights case before the Supreme Court as well as in the lower courts. The League has also worked to secure the passage of every civil rights act enacted in recent years beginning with the 1957 civil rights law, the first civil rights law passed since Reconstruction days. The League, we are proud to say, engaged in these activities at a time when it was not popular, and indeed, took courage to be for civil rights and equality for all Americans whatever their race, creed, color or national origin.*

Unlike others with whom we participated in that early struggle and with whom we are still partners in this continuing task, we have never deviated from our goal of making race, creed, color, sex and national origin irrelevant considerations in the conferral of benefits and treating persons as individuals and not as members of any identifiable group. Where, however, discrimination has been found to exist, we have not hesitated to invoke whatever remedies might be necessary including preferential treatment, to make whole the individual victims of such discriminatory practices. We have also endorsed outreach, training and other remedial programs as appropriate non-preferential affirmative action tools to eliminate discrimination.

We believe that much of the opposition to the Reynolds' nomination is grounded in the fact that as Assistant Attorney General of the Civil Rights Division the nominee has rejected the use of quotas and other numerical devices as affirmative action remedies. We have supported the Justice Department's refusal to resort to such discriminatory remedies in the fight to eliminate discrimination and have applauded Mr. Reynolds' role.

We respectfully request that this letter be made a part of the record of the hearings on the nomination.

Sincerely,

Kenneth J. Bialkin

Kenneth J. Bialkin
National Chairman

KJB:ld

TESTIMONY

BY

RICHARD J. FOX

CHAIRMAN

NATIONAL JEWISH COALITION

Thank you for allowing me this opportunity to come here today to share my thoughts with you concerning William Bradford Reynolds' nomination for Associate Attorney General at the U.S. Department of Justice.

I vigorously support Mr. Reynold's appointment to this important position because of the manner in which he has already proven himself during the past four years as Assistant Attorney General in the Civil Rights Division. In my view, he has shown himself to be not merely a dynamic and effective public servant. More importantly, he has breathed new life into the idea of equality for all under the law. I have been especially impressed with the leadership he has provided in the area of "quotas" and "affirmative action."

Affirmative action is a subject of vital significance to our society. The character of our nation has been determined in large part by the manner in which we treat our individual citizens and the answer to the simple questions: Are Americans being treated fairly or unfairly? Are all Americans being guaranteed equal opportunity, or are some being guaranteed equality result?

There seems to be two competing values that spark the continuing debate on today's major civil rights issues and which have provided very different answers to those questions I just mentioned. Indeed, much of the opposition to Mr. Reynolds' current nomination as Associate Attorney General is derived solely from this policy disagreement. In short this disagreement can be viewed as the value of equal opportunity as opposed to the value of equal results based on proportionate shares of the population. This philosophical difference has also come to imply very different meanings for the phrase "affirmative action."

When the term "affirmative action" is used as a measure of equality of opportunity, it implies that affirmative steps will be taken so that all individuals -- whatever their race, color, sex or national origin -- will be given the chance to compete with all others on equal terms, that each individual is to be given his or her place at the starting line without an artificial advantage or disadvantage. When "affirmative action" is used to connote a tool for achieving equality of results, by contrast, the promise is made that those who participate will arrive at the finish in prearranged places -- places allotted by race or sex.

Indeed, I find it hard to conceive how anyone can seriously defend the discredited doctrine of race-based preferential treatment, whether defined as quotas, goals, or in any other terms. Most Americans know all too well by now that the effect of preferential treatment has been to create divisions both between groups and within them. Quotas are indeed "creators of castes." They bifurcate society into those who have succeeded on their own merit and through their own efforts, on the one hand, and those, on the other hand, allowed to climb the ladder of social and economic success, legally and administratively leapfrogging innocent competitors in the process, simply because they belong to an officially favored group. Such a regime of goals and quotas, aside from its inherent unfairness, leaves all individuals at the mercy of the Federal Government, for what the government can arbitrarily confer on one group, it can also later take away and arbitrarily bestow upon another group.

Moreover, the promise of equal results is a false one. We can never assure equal results in a world in which individuals differ greatly in motivation and ability.

Under the civil rights leadership of Brad Reynolds, this Administration has been unswerving in its commitment to carrying out the original goal of affirmative action. Where unlawful discrimination exists, the Civil Rights Division has been active in seeing that it is brought to an abrupt and uncompromising halt; where that discrimination has harmed any individual, steps have been taken to ensure that every victim of the wrongdoing receives "make whole" relief; and "affirmative action" has been required, in the form of training programs and enhanced recruitment efforts to force open the doors of opportunity that have remained closed too long to far too many deserving individuals. Mr. Reynolds has demonstrated that he believes that the rights protected under our civil rights laws belong to individuals, not to groups. As Chairman of the National Jewish Coalition, I agree wholeheartedly with this view. We agree with the statement of Morris Abram, Vice Chairman of the U.S. Commission on Civil Rights that "The fact that the goal of racial justice is imperative and right does not mean that every possible method of getting there is acceptable."

There is now the very real hope that we will be able to bring an end to that stifling process by which government and society view its citizens as possessors of racial or gender characteristics, not as the unique individuals they are; where advancements are viewed not as hard-won achievements, but as conferred "benefits."

Mr. Reynolds stands with Martin Luther King, Jr. who, in front of the Lincoln Memorial during the 1963 March on Washington, appealed to all Americans to "judge his children by the content of their character rather than the color of their skin."

I believe this is an opportunity for us all to reaffirm our commitment to equal opportunity and at the same reward the services of a dedicated public servant by supporting Mr. Reynolds' nomination for Associate Attorney General of the United States.

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